1999

State of Utah v. Jacob Ross Hale : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Priority No. 2
v.	:	
JACOB ROSS HALE,	:	Case No. 990939-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999), AND AGGRAVATED KIDNAPING, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-302 (1999), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE LESLIE A. LEWIS PRESIDING

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NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Priority No. 2**
v.	:	
JACOB ROSS HALE,	:	**Case No. 990939-CA**
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for aggravated robbery, and aggravated kidnapping, both enhanced first degree felonies. This Court has jurisdiction of the appeal under UTAH CODE ANN. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. When the only juror to overhear the inadvertent remark,"they are guilty," from a then-unidentified person at the courthouse entrance (a) dismissed it as a "joke", (b) did not relate it to defendant's or any other case, and (b) did not believe it would interfere with her ability to be fair and impartial, is the trial court's denial of a mistrial motion based thereon "plainly wrong"?

The denial of a motion for mistrial is reviewed for an abuse of discretion. Indeed, "[u]nless a review of the record shows that the court's decision is *plainly wrong* in that

the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial, we will not find that the court's decision was an abuse of discretion." ***State v. DeCorso***, 1999 UT 57, ¶ 38, 993 P.2d 837 (quoting ***State v. Robertson***, 932 P.2d 1219, 1230 (Utah 1997)), ***cert. denied***, ___ U.S. ___ 120 S.Ct.1181 (2000).

2. When the victim's identifications of defendant from a photo array and from a subsequent lineup are superior in every respect to the showup identification upheld in *State v. Ramirez*, did the trial court properly determine that the victim's identifications in this case were constitutionally reliable and therefore admissible?

A trial court's decision to admit eyewitness evidence is a question of law that is reviewed under a correctness standard. ***State v. Ramirez***, 817 P.2d 774, 782 n.3 (Utah 1991); ***State v. Thurman***, 846 P.2d 1256, 1270 (Utah 1993); ***State v. Parra***, 972 P.2d 924, 925 (Utah App. 1998). However, "a correctness review necessarily incorporates a review of the trial court's resolution of factual questions and the associated determination of credibility that may underlie the decision to admit [,]" which subsidiary findings will be overturned only if clearly erroneous. ***Thurman***, 846 P.2d at 1270.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UTAH CONST. ART. I, § 7: "No person shall be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Defendant was charged with one count of aggravated robbery, a first degree felony, in violation of UTAH CODE ANN. § 76-6-302 (1999), and one count of aggravated kidnapping, a first degree felony, in violation of UTAH CODE ANN. § 76-5-302 (1999). The use of a handgun during the commission of the offenses gave rise to enhanced penalties under UTAH CODE ANN. § 76-3-203 (1999) (R. 005-007).

A ***Ramirez***[1] hearing to determine the reliability of the victim's identification of defendant from a photo-spread, and a subsequent line-up, was held on 19 August 1999 (R. 246) (a copy of the hearing transcript is contained in **addendum B**). The trial court ruled "that the [the victim's identification of the defendant] is a reliable eye-witness identification" (R. 246:47), **add. B**. Thereafter, written findings and conclusions in support of the ruling were entered on 27 October 1999 (R. 224-228) (a copy of the written ruling is contained in **addendum C**).

Prior to trial, but after the jury was empaneled, defendant moved for a mistrial based on an allegation of juror taint (R. 247:116) (the pertinent transcript pages are contained in **addendum A**). Specifically, defendant alleged that the jury pool overheard a "guilty"comment at the courthouse entrance (***id.***). The alleged taint was brought to the trial court's attention by an attorney who had overheard the remark (R.247:116-132), **add. A**. The trial court's inquiry revealed that the only juror to overhear the remark, "they

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[1]***See State v. Ramirez***, 817 P.2d 774 (Utah 1991).

are guilty," did not know where it came from, dismissed it as a joke, did not relate it defendant's or any other case, and did not believe that it would not effect her ability to be fair and impartial (R. 247:120), **add. A**. Finding that the incident would not, therefore, impact defendant's case, the trial court denied the mistrial motion (R. 247:144), **add. A.**

At the conclusion of the two-day jury trial (R. 247, 248), defendant was convicted as charged (R. 248:102-103). The trial court imposed the indeterminate statutory term of from ten-years-to-life for the aggravated kidnaping, and the statutory indeterminate term of from five-years-to-life for the aggravated robbery (R. 249:23). Additionally, the trial court imposed one additional year for each conviction based on the gun enhancements (R. 249: 23). The sentences were to be served consecutively (***id***). Defendant filed a timely notice of appeal (R. 215).

STATEMENT OF THE FACTS

Mitchell Lewis was enjoying his lunch and reading the newspaper while sitting in his car at Sugarhouse Park when defendant and a cohort pointed a gun at him through his car window, robbed him of his cash and credit cards, kidnapped him, and ultimately left him stranded up Big Cottonwood Canyon.

Aggravated Robbery

At approximately 11:45 a.m., on 19 March 1999, Lewis was sitting in his white Honda, reading the newspaper and eating his lunch (R. 247:146-147). He looked into his rear view mirror and noticed two Caucasian men, both wearing baggy pants and white

tank tops, approaching his car from the rear (R. 246:9) (R. 247:153). As Lewis returned to reading his paper, the men passed by the passenger side of his car (R. 246:10) (R. 247:153). Lewis noticed the men again when he looked up to observe that they were about one hundred feet in front of his car and walking back towards him (R. 246:11) (R. 247:154). Lewis noticed the men a third time when they walked to the driver's side of his car (R. 246:12, R. 247:154).

Defendant leaned towards Lewis's window and asked, "Do you know where 'Play It Again Sports' is ?" (R. 246:12-13) (R. 247:156). Lewis said "No. I don't think it is in this area" (***id.***). Defendant then "lifted" a shirt he had draped over his hand to reveal a gun pointed directly at Lewis and said, "Well you're going to take us there anyway" (R. 246:13) (R. 247:156). Defendant ordered Lewis to unlock the car door, and Lewis complied (R. 246:14) (R. 247:157).

Codefendant Jason Dongarra, moved to the passenger side of Lewis's car, opened the door and "rummaged" through Lewis's belongings, including his wallet (R. 246:14) (R. 247:157). Dongarra took Lewis's cash while defendant took both Lewis's check guarantee card and his Visa card and compelled Lewis to disclose his personal identification number (R. 247:158, 161-162).

Defendant then ordered Lewis to get into the back seat of the car (R. 247:158-160). Defendant sat next to Lewis in the back seat while Dongarra drove (R. 247:151, 159-160). Defendant continued to rifle through Lewis's wallet, and after looking at

Lewis's drivers license, told Lewis that he knew where he lived and that he had people in the area (R. 247:161).

Aggravated Kidnapping

Dongarra drove the Honda out of Sugarhouse Park as defendant continued to point the gun at Lewis (R. 247:159). Defendant directed Dongarra to get onto Interstate 80 and head east (***id.***). Dongarra left the interstate at 3900 South and heading into the Olympus Cove area (R. 247: 60-161). Defendant told Dongarra not to stop in Olympus Cove because "there are too many houses, too many people. People will hear the shots here" (R. 247: 63). Defendant asked Lewis if he was familiar with the movie *Pulp Fiction* and then told Lewis, "[i]f you try to get out of the car, I'll shoot you" (R. 247:163).

Dongarra eventually ended up four or five mile up Big Cottonwood Canyon (R. 247:164). Defendant asked Lewis if he had a tire iron in the trunk (R. 247:166-167). He then ordered Dongarra to open the trunk and handing him the gun, said, "[k]eep this on him, and keep the safety off" (R. 247:166-167). After searching the trunk, defendant returned to the side of the car, retrieved the gun from Dongarra, and ordered Lewis to walk down into the ravine at the side of the road (R. 247:168). Lewis did as he was ordered, with defendant following behind (***id.***). Defendant then ordered Lewis to sit on a rock while defendant stood nearby (R. 247: 170-171). Dongarra left and did not return

for approximately two hours (R. 247:173). Upon his return Dongarra yelled to defendant that he had obtained $300[2] (*id.*).

Defendant ordered Lewis to walk further down into the ravine (R. 247:174). He then instructed Lewis to sit on another rock, remove his shoes, and "throw them as far as you can" (*id.*). Defendant also told Lewis to stay put for at least twenty minutes (R. 247:176). Defendant and Dongarra then left in Lewis's car, leaving him stranded (R. 247:175-177).[3]

Lewis was eventually rescued by a passing motorist and reported the kidnapping and robbery to police (R. 247:176). Ten days later, Lewis identified defendant from a photo array (R. 247:179-182), and from a lineup approximately one month after that (R. 247:181-182, 204-205). Lewis identified defendant a third time at trial (R. 247:155-156, 182).

Defendant asserted he was at his girlfriend's home near Sugarhouse Park at the time of the robbery and kidnaping, and that he was heavier and taller than the person Lewis described, and otherwise failed to match Lewis's description (R. 247:25-30).

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[2]It later was disclosed that this money was obtained using Lewis's check guarantee card (R. 247:223-225).

[3]Defendant and Dongarra were seen with Lewis's Honda later that same day and for approximately four days following the incident (R. 247:223-226). Thereafter they ditched the Honda in Copperton, Utah (R. 247: 227). Dongarra wiped the car down to remove any fingerprints and also removed the tires and placed them on the ground near the Honda (R. 247:228).

Defendant admitted being with Dongarra in a stolen Honda on the afternoon of the robbery and kidnapping (R. 247:31-35).

SUMMARY OF THE ARGUMENT

Point I. Defendant fails to demonstrate that the trial court's refusal to grant a mistrial was plainly wrong. Indeed, the only juror to overhear the inadvertant remark, "they are guilty," from a then-unidentified person at the courthouse entrance (a) dismissed it as a "joke", (b) did not relate it to defendant's or any other case, and (b) did not believe it would interfere with her ability to be fair and impartial.

Point II. The victim's identifications of defendant from a photo array and from a subsequent lineup are superior in every respect to the showup identification upheld in ***State v. Ramirez***; therefore, the trial court properly determined that the identifications were constitutionally reliable and admissible for the jury's evaluation.

ARGUMENT

POINT I

DEFENDANT WAS NOT ENTITLED TO A MISTRIAL WHERE PRIOR TO JURY SELECTION IN THIS CASE, A SUBSEQUENTLY EMPANELED JUROR OVERHEARD SOMEONE YELL, "THEY ARE GUILTY," AT THE COURTHOUSE ENTRANCE

In Point I of his brief, defendant asserts that he was entitled to a mistrial because a member of the jury pool who was subsequently selected to serve on his jury overheard someone at the courthouse entrance yell, "they are guilty"(R. 247:116-120). Aplt. Br. at 13-21. The trial court denied the motion after determining that the incident would not

impact defendant's case because the juror stated that she (a) had dismissed the comment as a joke, (b) did not believe it was related to defendant's or any other case, and that (c) it would not effect her ability to be fair and impartial (R. 247:120, 144). Defendant fails to demonstrate that the trial court's ruling is "plainly wrong." ***State v. DeCorso***, 1999 UT 57, ¶ 38, 993 P.2d 837 (quoting ***State v. Robertson***, 932 P.2d 1219, 1230 (Utah 1997)), ***cert. denied***, ___ U.S. ___ 120 S.Ct.1181 (2000).

A. Proceedings Below

Prior to trial, but after the jury was empaneled, defendant moved for a mistrial alleging juror taint (R. 247:133), **add. A**. Specifically, defendant alleged that the jury pool overheard a comment, "guilty, guilty, guilty," made by a bailiff operating the metal detector at the courthouse entrance (R. 247:116), **add. A**. The incident was brought to the trial court's attention by an attorney who had overheard it (***id.***). The trial court questioned its own bailiffs, the empaneled jurors, and both of the involved courthouse entrance bailiffs (247:119-123,129-131), **add. A**.

Neither Bailiff Rowley, nor Bailiff Hall, the bailiffs assigned to bring the jury pool to defendant's courtroom, overheard the remark (R. 247:119, 126), **add. A**.

The empaneled jurors were questioned as a group whether they had overheard "any reference to defendant's case, guilt, non-guilt, innocence, whatever, from any of the officers at the metal detector this morning?" (R. 247:120), **add. A**. Juror Murray, the only juror to raise her hand, said that she had overheard "[s]omething to the effect of –

'they are guilty[,]'" but was "not sure who said it, someone yelled it out" (***id.***). The trial court's colloquy with juror Murray proceeded as follows:[4]

THE COURT:	Do you understand that this was just a joking comment.
JUROR:	Yes.
THE COURT:	You did not understand it to be pertaining to this or any other particular case; is that right?
JUROR:	Yes.
THE COURT:	From your expression, Ms. Murray, I'm assuming that you felt it was kind of a silly remark and did not pertain to this case; is that correct?
JUROR:	Yes.
THE COURT:	Has that in any way interfered with your ability to be fair and impartial in this case?
JUROR:	No.
THE COURT:	And you did not understand it to refer to this case in particular; is that correct?
JUROR:	That's correct.

(R. 247:119-120), **add. A.**

Following this exchange, the trial court instructed the empaneled jurors that they

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[4]Juror Murray was previously sworn in along with the other jurors, in connection with the just completed voir dire proceeding (R. 247:11).

> . . . should understand that the bailiffs and the officers who were at the mental [sic] detectors had have [sic] no idea which cases are being tried in which court.
>
> And even if they did know which cases are being tried in which courts, they know noting about any of the cases. It would be to say there are about fourteen judges on this floor, and that some of the cases are criminal, some of them are civil. They all involve different facts.
>
> And there certainly is never any conversation by this Court or my staff with any of those people, nor do they share copies of the pleadings or anything of that nature.

(R. 247:121), **add. A.**

The trial court also ascertained that neither defense counsel nor the prosecutor had spoken about the case "with anyone at the portals" (***id.***).

Defense counsel requested one follow-up question of juror Murray: "[W]hether or not there was any response by anybody to what Ms. Murray overheard by another bailiff or any other person" (R. 247:122), **add. A.** The trial court agreed to so inquire and Murray said, "No" (***id.***). The trial court then reiterated its understanding that Murray had not discussed the comment "with any of [her] fellow jurors," and that she had not taken it seriously, believing it to have been "silly" (***id.***). Juror Murray affirmed the trial court's understanding (***id.***).

Turning again to the empaneled jurors, the trial court stated:

> All right. And Again, let me tell each and every one of you that you know the work that occurs in this building, whether it's a civil case or a criminal case, or domestic case, it's important work, and I think that sometimes some people don't give it the seriousness it deserves because they try to lighten the mood. The reference Ms. Murray heard was not in

> connection with this case in particular, and it sounds like it was an absolutely stupid, insensitive remark, certainly should never have been made.
>
> But I think it's safe to say that it had nothing to do with this case, and that it should never have been made in any event.
>
> But I want to be sure that all of you understand that if you feel its impacts, you, Ms. Murray, or any of you in hearing about it, I want to know now. Do any of you feel like it's had any effect on you?

(R. 247:122-123), **add. A**. The jurors all shook their heads in the negative (R. 247:123), **add. A**. Defense counsel requested no further inquiry (***id***).

Shortly thereafter, outside the jury's presence, the trial court questioned the two involved bailiffs, Bailiff Twitchell, and Bailiff Galloway (R. 247:124-125, 129), **add. A**. Bailiff Galloway said his conversation with Bailiff Twitchell was in a "joking manner" (R. 247:129), **add. A**. Bailiff Twitchell admitted saying to Bailiff Galloway: "'You know, it's a good thing when they put the jury together that they don't instruct them on guilty, guilty, guilty, guilty'" (R. 247:130), **add. A**. Both bailiffs denied that their conversation had any reference to defendant's case (***id.***). Bailiff Twitchell observed that he "had no idea who the jury was for or what it was pertaining– who the jury was [sic]" (***id.***). Bailiff Galloway affirmed Bailiff Twitchell's recollection, adding only that he laughingly responded, "'guilty, guilty,' . . . that's it" (R. 247:131), **add. A**. He was not looking at the jurors at the time he made the comment, and he did not understand that any one of the jurors had overheard him (***id.***). The trial court admonished the bailiffs, and then, turning to defense counsel, observed that it was "clear" that

> this was in the context of general comment about how important it was that jurors not be told anything about not guilty or guilty, guilty, guilty, but apparently those words were used. Apparently the one juror who heard it heard the word guilty. I don't– the juror was clear that she did not form an opinion as a result of that, nor did she correlate those remarks or those words–I should say, with this case, or take them to heart.

(R. 247:132), **add. A.**

Thereafter, although recognizing that "[juror Murray] indicated that she didn't take it seriously," defense counsel moved for a mistrial (R. 247:133-134), **add. A.** The trial court denied the motion on the ground the incident would not in any way "interfere" with defendant's right to a fair trial: "And I thought about it and considered it, and if I thought it would have any impact, I would have granted the motion. But I don't think it will" (R. 247:144), **add. A.**

A. Defendant Fails to Establish that *Any* Unauthorized Juror Contact Occurred

In claiming prejudice on appeal, defendant relies on the declaration in ***State v. Pike***, 712 P.2d 277, 279 (Utah 1985), that "a rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, and brief contact." ***See*** Aplt. Br. at 13. The supreme court identifies two reasons for its rebuttable presumption rule: "(1) the inherent difficulty in proving how or whether a juror has in fact been influenced by conversing with a participant in the trial, and (2) the deleterious effect upon the judicial process because of the appearance of impropriety from such contact."

State v. Jonas, 793 P.2d 902, 908 (Utah App.) (citing ***Pike***, 712 P.2d at 280), ***cert. denied***, 804 P.2d 1232 (Utah 1990). Significantly, ***Pike*** involved a *conversation* about a personal incident which took place between an important prosecution witness (arresting officer and eyewitness) and three jurors. The conversation in ***Pike*** accordingly gave rise to a rebuttable presumption of prejudice because it was "more than a brief, incidental contact and no doubt had the effect of breeding a sense of familiarity that could clearly affect the juror's judgment as to the [witness's] credibility." ***Pike***, 712 P.2d at 281.

Neither reason given for presuming prejudice is present here. Indeed, this case does not involve a contact, let alone, a conversation, between a juror and a trial participant. ***See State v. Tenney***, 913 P.2d 750, 756-757 (Utah App.) (distinguishing ***Pike*** on ground that disputed conversation was between a juror and a trial outsider), ***cert. denied***, 923 P.2d 693 (Utah 1996). As there was no "contact" here, there was "no appearance of impropriety from such contact." ***Jonas***, 793 P.2d at 908. To the contrary, ***Tenney*** teaches that under circumstance such as here, "there is a presumption that the juror[] behaved properly, and it is the defendant's burden to provide 'some definite proof of misconduct and that the said misconduct was prejudicial.'" ***Tenney***, 913 P.2d at 756 (quoting ***Arellano v. Western Pac. R.R.***, 5 Utah 2d 146, 298 P.2d 527, 530 (Utah 1956)). ***Tenney*** applied this presumption of proper juror behavior even though the juror in that case *initiated* a conversation about Tenney with a work colleague, a trial outsider. ***Id.*** at 756.

Here, the trial court's inquiry demonstrated that juror Murray did not even know who made the inadvertent "guilty" remark, and that neither of the involved bailiffs had directed their comments to juror Murray or any other member of the jury pool (R. 247:130-131), **add. A.** Indeed, the bailiffs were not even looking in the direction of the jury pool at the time the remark was made (***id.***). The most that can be said is that juror Murray overheard the "guilty" remark by a then unknown person at the courthouse entrance, before juror Murray was even selected as a juror in defendant's case (R. 247: 120), **add. A.** Importantly, juror Murray did not relate the remark to defendant's or any other case in particular, nor did she believe it would effect her ability to be fair and impartial (***id.***). She also did not discuss the remark with any of the other members of the jury pool, and no other juror reported hearing the remark, or anything similar thereto (***id.***). Accordingly, no unauthorized "contact" occurred and the trial court reasonably determined that a mistrial was unwarranted.[5]

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[5]Defendant complains that the other jurors learned of the comment when the trial court's questioned juror Murray. Aplt. Br. at 19. However, as set out above, they heard about the incident contemporaneous with the trial court's admonition that the improper comment was inadvertent, unrelated to defendant's case, and should play no part in their deliberations (***see*** R. 247:122-123), **add. A**. All the jurors shook their heads in the negative when the trial court asked if they felt the remark had "had any effect"on them (R. 247:123), **add. A**. Defense counsel requested no further inquiry, either individually, or as a group (***id***). Defendant points to nothing in the record suggesting that the jurors' assurances, that the remark had no effect on them, should be discounted. Indeed, contrary to defendant's assertion, the jurors, like juror Murray, were under oath at the time. ***See*** n.4, ***supra***, and subsection (B), ***infra***.

Even if juror Murray's inadvertent overhearing of the remark here rises to the level of an "unauthorized contact," under ***Pike***, it still does not give rise to a presumption of prejudice. In ***Jonas***, 793 P.2d at 908, this Court found that an even an "intentional" contact did not necessarily give rise to presumptive prejudice because it was also an "incidental" contact. Just prior to deliberations in ***Jonas***, a juror was excused after his pregnant sister was murdered. ***Id.*** at 906-907. Upon leaving the courthouse, the juror asked the bailiff to explain his absence to the other jurors and the bailiff did so: "I went in and I told them that Mr. Davis wouldn't be in because his sister was the lady that was shot out in West Valley." ***Id.*** at 907.

On appeal, this Court distinguished ***Pike*** on the grounds the intentional contact in ***Jonas*** (a) did not involve either a trial participant, or (b) a conversation "in the normal sense of an 'oral exchange of sentiments, observations, opinion, [or] ideas." ***Id.*** at 908. Indeed, "[t]here was no exchange at all because the jurors said nothing." ***Id.*** Accordingly, the Court concluded that the first ***Pike*** concern, the difficulty in proving a juror has in fact been influenced was absent. ***Jonas***, 793 P.2d at 908. The ***Jonas*** bailiff's message was only tenuously connected to the trial, and though intentional, it was not the kind of communication which would prejudice the jury judgement regarding their verdict. ***Id.*** at 908. Particularly when the bailiff's credibility was not at issue. ***Id.*** He did not testify and the truth of his statement was irrelevant to the trial proceeding. ***Id.***

The second ***Pike*** concern about the appearance of impropriety was also deemed absent. ***Id.*** While juror/witness contacts "make the entire judicial process look collusive or unfair" the Court could not say the same of the bailiff/jury contact in ***Jonas*** because it was not connected to a trial issue and was unavoidable as the bailiff was assigned to minister to the jurors' needs. ***Id.*** Thus the Court concluded: "We do not believe that ***Pike*** compels the conclusion that prejudice presumptively results when a bailiff says anything other than "Hello" or "Good morning" to a juror at a time when the case has not even been submitted to the jury for deliberations." ***Jonas***, 793 P.2d at 908-909. The Court also emphasized that the ***Jonas*** bailiff did not mingle with the jurors or converse with them; nor did he interrupt their deliberations. ***Id.*** at 909. Therefore, his brief contact concerning something tangential to the trial itself did not give rise to any appearance of impropriety and raised no presumption of prejudice. ***Id.***

The instant facts present an even more compelling case *against* presumptive prejudice than either ***Tenney*** or ***Jonas***. Unlike these cases, *no* contact and/or conversation, intentional or otherwise occurred here. ***See also State v. Day***, 815 P.2d 1345, 1350 (Utah App. 1991) (initial unauthorized contact between State's witness (a deputy sheriff), and juror, though intentional, was also incidental, brief and without conversation; therefore, no presumptive prejudice).

B. Any Arguable Presumptive Prejudice Was Adequately Rebutted

Even if the inadvertent overhearing of the remark at the courthouse entrance is deemed sufficient to give rise to a rebuttable presumption of prejudice under ***Pike***, it is adequately rebutted here for the same reasons that it is doubtful the presumption even attached in the first instance. ***See*** Point II(B) (C), above. Despite defendant's suggestion to the contrary, nothing in the record indicates that juror Murray was untruthful when she indicated that she (a) dismissed the comment as a "joke"; (b) did not relate it to this or any other trial, and that (c) it would not effect her ability to be fair and impartial (R. 247:120), **add. A.**

Defendant cites ***Logan City v. Carlsen***, 799 P.2d 224, 227 (Utah App. 1990), to support his assertion that juror Murray's statements are inadequate to rebut any presumption of prejudice here because they were not made under oath. Aplt. Br. at 19. However, ***Carlsen*** is distinguishable here, first, because it involved an intentional, and lengthy unauthorized conversation between the bailiff and jurors regarding the "sensitive subject of sentencing." ***Id.*** at 225. Second, the ***Carlsen*** trial court did not inquire of the jurors whether they were prejudiced by the improper contact. ***Id.*** at 226. Under these circumstances, the Court found the ***Carlsen*** bailiff's unsworn statement insufficient to rebut the presumption of prejudice. ***Id.***

In this case, contrary to ***Carlsen***, the trial court inquired of the jurors, all of whom had been sworn in prior to their participation the voir dire proceeding (***see*** R. 247:11),

whether they had overheard anything related to defendant's trial (R. 247:119), **add. A**. As set forth above, only juror Murray responded affirmatively, and she indicated that she had not only dismissed the remark as a "joke," but that she had not communicated it to others, nor did she believe it would effect her ability to be fair and impartial (R. 247:120), **add. A**. Thus, the instant trial court complied with ***Carlsen***'s teaching that "in most instances it would be helpful" to have the effected jurors testify. ***Id.*** at 226.

Based on the above, the trial court's denial of the mistrial motion is not "plainly wrong" and should be affirmed. ***DeCorso***, 1999 UT at ¶ 38.

POINT II

BECAUSE LEWIS'S IDENTIFICATIONS OF DEFENDANT FROM A PHOTO ARRAY AND LINEUP ARE SUPERIOR IN EVERY RESPECT TO THE SHOWUP IDENTIFICATION UPHELD IN *RAMIREZ*, THE TRIAL COURT PROPERLY DETERMINED THE IDENTIFICATIONS WERE CONSTITUTIONALLY RELIABLE AND ADMISSIBLE

In Point II of his brief, defendant asserts that Lewis's identifications of him are unreliable because: (a) Lewis was extremely frightened during the kidnaping and robbery; and (b) Lewis did not have sufficient opportunity prior to the crimes to view defendant. Aplt. Br. at 30-31, 33. Additionally, defendant claims that Lewis's identification of him at the lineup was tainted because police told Lewis that he picked the same individual they suspected following his identification of defendant from the earlier photo array. Aplt. Br. at 32-33. Defendant's claims are meritless.

A. The Ruling Below

Following an evidentiary hearing to determine the reliability of Lewis's pretrial identifications of defendant, the trial court made the following factual findings:[6]

1. On March 19, 1999, Mitch Lewis, a white male in his later thirties, was seated alone in his car parked in Sugarhouse Park reading the newspaper. It was daytime and the area was well lighted. Mr. Lewis could see clearly with his glasses that he was wearing at the time (***see*** R. 246:6-9, 42).

2. Mr. Lewis looked into the rearview mirror and saw two white males walking toward him. He returned to reading (***see*** R. 246:9-10).

3. Mr. Lewis looked up again as the two walked within a few feet of his car (***see*** R. 246:10).

4. Mr. Lewis looked up again and saw the two males walking back toward his car. This time Mr. Lewis saw the faces of the two (***see*** R. 246:11).

5. Mr. Lewis looked up the final time to see the two males standing within a few feet of the driver's door of his car (***see*** R. 246: 246:12).

6. One of the males, later identified as defendant, spoke to Mr. Lewis about the location of a local business (***see*** R. 246:12-13).

7. Defendant had dark glasses on and had some facial hair but otherwise his face was uncovered. The other male, later identified as Justin Dongarra did not have his face covered either (***see*** R. 246:12, 32).

8. As Mr. Lewis first spoke with the two males, he was not upset or frightened. He was rested and was not under the influence of alcohol or drugs. He had taken some prescription drugs. One of these was

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[6]The trial court's factual findings accurately recite the pertinent facts; therefore, they are reproduced here, adding citation to the transcript of the evidentiary hearing.

for depression and actually helped clear his mind. He was not under the influence of these drugs nor did they interfere with his ability to observe and remember (*see* R. 246:6-7, 13, 44).

9. Defendant pulled a gun and pointed it at Mr. Lewis. Defendant then had Mr. Lewis get out of the car. As Mr. Lewis did, he stood within a few feet of defendant. He was able to see defendant as they stood and was able to compare heights and listen to his voice (*see* R. 246:13-15,42-43).

10. Defendant directed Mr. Lewis to sit in the back seat of the car. Defendant got into the back seat and sat inches away from Mr. Lewis (*see* R. 246:15-16).

11. Justin Dongarra drove the car. For more than one hour, the three drove around. During this time the two made direct and implied threats to Mr. Lewis (*see* R. 246:15-16).

12. Mr. Lewis saw the side of defendant's face and could see defendant's eyes through the side of the dark glasses. Mr. Lewis noted that defendant blinked in a slow unusual manner. Mr. Lewis also saw the front of defendant's face for brief periods of time during the trip (*see* R. 247:17, 26).

13. Eventually, defendant and Mr. Dongarra drove Mr. Lewis up Big Cottonwood Canyon and stopped the car. They made Mr. Lewis get out and walk down the roadside toward the creek. Defendant followed. Mr. Dongarra drove away in the car (*see* R. 246:18).

14. Defendant held Mr. Lewis at gunpoint for another hour. During this time, defendant was only a few feet away from Mr. Lewis. The two talked. Mr. Lewis saw defendant's face from the front. It was still daylight and lighting allowed Mr. Lewis to see defendant's face clearly (*see* R. 246:19, 30).

15. Mr. Lewis was frightened during the event but he was deliberate and thoughtful in his approach. Furthermore, Mr. Lewis tried to observe and remember the defendant's face. He also tried to engage defendant in a conversation, and did so for a considerable time, in an attempt to keep

defendant calm so Mr. Lewis would survive the encounter (*see* R. 246:17, 19, 26).

16. Eventually, Mr. Lewis was released and he contacted the police and reported the crime (*see* R. 246:19-20).

17. Approximately ten days later, police showed Mr. Lewis two series of six color photographs. One set that included defendant's photo and one set that included Mr. Dongarra's photo. The photographs contained different individuals with similar characteristics. Mr. Lewis was not told whether the defendant or Mr. Dongarra were in the photographic lineups. Mr. Lewis picked out both defendant and Mr. Dongarra. After Mr. Lewis picked out both suspects, the detective told Mr. Lewis that he had picked out the two persons arrested for the crime (*see* R. 246:19-22, 33, 43-44).

18. On May 4, 1999 a lineup was held in the Salt Lake County S.O. lineup room. Eight individuals with similar characteristics were in the lineup. Defendant was included in those eight. Again Mr. Lewis picked out defendant as the person who committed the crime charged. Afterwards Mr. Lewis asked the prosecutor if he had picked the defendant. The prosecutor confirmed that Mr. Lewis had picked out the person charged with the crime (*see* R. 246:24-25, 33-34).

19. Mr. Lewis has never identified persons other than defendant and Mr. Dongarra as the two persons who committed the crime (*see* R. 246:22-23, 33-34).

20. Mr. Lewis' testimony about the events was detailed and clear. He is an unusually articulate and clear witness. He did not know the suspects or have any motive against them (*see* R. 246:41, 42).

(R. 224-226), **add. C**.

Based on the above findings, the trial court concluded as follows:

1. Mr. Lewis had an adequate opportunity to view the persons who robbed and kidnapped him. The event took over two hours, a

considerable amount of time to observe. The light was sufficient. The suspects stood or sat at close distances to Mr. Lewis. Other than the dark glasses the suspects' faces were not covered or obscured.

2. Mr. Lewis paid a high degree of attention to the event. He knew he was being robbed. He deliberately tried to see and remember the suspects who were committing the crimes of which he was the victim.

3. Mr. Lewis was not limited or impaired. Instead, he was very deliberate, calm and thoughtful. He is also clear and articulate. He was old enough to understand and comprehend the nature of the events. He had sufficient capacity to observe and remember the event.

4. Mr. Lewis' identification was spontaneous and not the product of suggestion. The photographic and physical lineups were conducted properly and not in a suggestive manner.

5. The nature of the event was one that Mr. Lewis was likely to remember and relate correctly. The race of the participants was the same. Mr. Lewis was free from bias. Mr. Lewis tried to remember the event. It lasted a long time. Mr. Lewis understood that he was being robbed and kidnapped.

6. The detective's statement confirming that Mr. Lewis had picked out the suspects held by the police did not occur until after the photographic lineup was completed. The prosecutor's statements that Mr. Lewis had picked out the person charged did not occur until after the lineup was completed. These statements did not make either the photographic lineup or the physical lineup improperly suggestive.

7. Mr. Lewis' out-of-court and in-court identifications are sufficiently reliable that the identifications should be presented to the jury during the trial.

(R. 226-227), **add. C.**

B. *Ramirez* Compels Affirmance on These Facts

In comparing this case with ***Ramirez***, defendant has variously omitted facts describing conditions and circumstances of observation superior to those in ***Ramirez***, and gratuitously presumed that this victim had a compromised mental state throughout the aggravated robbery and kidnapping incident. ***See*** Aplt. Br. at 28-34. Contrary to defendant's suggestion, Lewis's identifications of defendant from a photo array and from a subsequent lineup are superior in every respect to the sole eyewitness identification upheld in ***Ramirez***.

In ***Ramirez***, the Utah Supreme Court extended its recognition that eyewitness testimony is both potent yet fallible, ***see State v. Long***, 721 P.2d 483, 488-91 (Utah 1986), thereby requiring the trial court, in cases where eyewitness identification was central to the case, to undertake "an in-depth appraisal of the identifications' reliability," preliminary to admitting such testimony under article I, section 7 of the Utah Constitution. ***Ramirez***, 817 P.2d at 780. Noting that "[t]he ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable," the supreme court listed the following pertinent facts by which constitutional reliability must be determined:

> (1) The opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the even being observed and the

> likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the even was an ordinary one in the mind of the observer during the time it was observed and whether the race of the actor was the same as the observer's.

Id. at 781.[7] Applying these factors to the eyewitness identification in ***Ramirez***, the supreme court found that, although an "extremely close case," the trial court had properly denied Ramirez's motion to suppress. 817 P.2d at 782-84.[8]

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[7]In ***Ramirez***, two armed, masked men robbed a Pizza Hut. ***Id.*** at 778. Shortly before 1:00 a.m., Kathy Davis, the manager of the Pizza Hut, was preparing to leave the restaurant with her husband, John Davis, and her brother, Gerald Watson. ***Id.*** Upon leaving, they were accosted by a man (the "pipe man") wearing a scarf across his face who demanded the day's receipts. ***Id.*** A scuffle followed and the pipe man hit Wilson with the pipe and told a previously undetected robber (the "gunman") to kill Wilson if he moved again. ***Id.*** The gunman, Ramirez, also wore a scarf covering most of his face, and was crouched near the corner of the building, holding a gun. ***Id.*** When the Davises returned with the bank bag, the robbers fled. ***Id.***

Ramirez was stopped a short time after the robbery and a few blocks from the Pizza Hut, when he was found to match the description of one of the robbery suspects. ***Id.*** at 777-776. Police brought the Davises and Wilson to the scene of Ramirez's detention, apparently informing them that "the officers had found someone who matched the description of one of the robbers." ***Id.*** at 777. When the witnesses arrived at the showup, Ramirez, a dark-complexioned Apache Indian, was handcuffed to a chain link fence. ***Id.*** He was the only suspect, and the spotlights and headlights of patrol cars were turned on him. ***Id.*** The witnesses viewed him from a patrol car. ***Id.*** Only Wilson was able to identify Ramirez as the gunman; the other two witnesses were unable to identify him as one of the robbers. ***Id.***

[8]Regarding the first factor, the witness's opportunity to view the actor during the event, the supreme court noted Wilson varied in his statements about how long he viewed the gunman, from a "few seconds" or a "second," to "a minute" or longer. ***Ramirez***, 817 P.2d at 782. The evidence indicated that the gunman was crouched by the end of the building, that Wilson viewed him from between ten to thirty feet, that at one point his view was obstructed, that the lighting was variously described from good to poor and the gunman was in a shadowy area, and that Wilson could only determine that the gunman's eyes were small. ***Id.*** at 782-83.

As to the second factor, the witness's attention to the actor, Wilson was fully aware that a robbery was taking place and claimed to have focused on the gunman to the exclusion of the pipe man, even though he was still threatened by the pipe man when he saw the gunman and gave a much more detailed description of the pipe man than of the gunman at the time of the robbery. ***Id.*** at 783.

Regarding the third factor, the witness's capacity to observe the actor during the event, the supreme court found that it was reasonable to assume that Wilson experienced "a heightened degree of stress," since, in struggling with his assailant, the witness was hit once in the stomach with the pipe and almost hit a second time. Wilson described his eyesight as good with his glasses, and "[a]side from the late hour and the injury from the pipe blow," there was no record evidence of any other physical impairments. ***Id.***

The fourth reliability factor concerns whether the identification was spontaneous and remained consistent or whether it was the product of suggestion. ***Id.*** In ***Ramirez***, the supreme court found that thirty minutes to an hour between the robbery and the identification as no indication that Wilson's mental capacity affected his identification. ***Id.*** at 783. Although he was aware that one of the other witnesses had not identified Ramirez, he was not otherwise exposed to other identifications or opinions, and neither of the other two witnesses identified Ramirez as the gunman. ***Id.*** However, the witness's physical descriptions of the gunman were "confused." ***Id.*** Wilson have a very detailed description of the pipe man, but merely described the gunman as "a male Mexican, five feet nine inches to six feet tall, wearing a blue sweater and Levi's, with a white scarf around the lower part of his face." ***Id.*** John Davis, on the other hand, described Ramirez as five foot six inches tall and wearing a red and white cap. ***Id.*** at 784. Although Ramirez had readily visible tattoos on his arms, Wilson did not mention them at the time of the robbery or at the preliminary hearing, stating for the first time at trial that he had seen them on the gunman. ***Id.*** At the time of arrest, Ramirez was wearing Levi's and a blue sweatshirt with paint spattered on the front, but which may have been worn inside out and a brown baseball cap. ***Id.*** At the suppression hearing, Wilson positively stated that the gunman wore no hat, although at trial he was not sure. ***Id.***

Most "troublesome" for the supreme court was the "blatant suggestiveness" of the showup, which, involved the lone suspect, handcuffed to a fence, the target of headlights, surrounded by police who had indicated to witnesses that they had located someone who fit one of the robber's description. ***Id.*** The suggestiveness of the showup was compounded because none of the witnesses ever saw the gunman without the mask, and the sole identifying witness made his identification based only on the gunman's eyes, and view of which this Court assumed must have been compromised by the gunman's wearing a hat. ***Id.*** The supreme court somewhat discounted the racial distinction because the identification was based only on the gunman's eyes, physical size and clothing. ***Id.***

(1) Lewis Had Over Two Hours to View Defendant During the Robbery and Kidnapping and Suffered From No Physical Impairment

The first three ***Ramirez*** factors take into account an eyewitness's opportunity to view suspects, as well as the witnesses degree of attention to, and capacity to observe the suspects. ***Id.*** at 782. The ***Ramirez*** robber was masked, crouched down, and viewed from ten to thirty feet away, at night. ***Id.*** Here, on the other hand, Lewis had over two hours within which to view defendant's *unmasked* face (a) at the park, (b) while riding in the backseat of the car, and (c) in the ravine up Big Cottonwood Canyon (*see* R. 226), **add. C** ***See State v. Willett***, 909 P.2d 218, 220, 224 (Utah 1995) (finding eyewitness's "few seconds" observation of defendant "sufficiently reliable" to be admitted). While defendant wore sunglasses most of the time, Lewis was able to see his face behind the glasses, particularly when he sat next to defendant in the back seat, separated only by a few inches (*see* R. 225), **add. C**. Lewis particularly concentrated on observing and remembering defendant's face and also intentionally engaged defendant in conversation (R. 225A), **add. C**. In particular, Lewis noted defendant's unusually slow blinking pattern (R. 225-224), **add. C**. These observations were all made in broad daylight while Lewis was wearing his own prescriptive glasses and he was not otherwise impaired (R. 224-225A), **add. C.**

(2) Lewis Provided an Accurate Description to Police the Day of the Robbery and Kidnapping

The fourth ***Ramirez*** factor takes into account the spontaniety and consistency of the eyewitness identification. 817 P.2d at 783. Lewis provided an accurate description to police the day of the robbery and kidnapping (R. 246:26), **add. A**. Based on Lewis's description, the police put together a photo array from which Lewis identified defendant 10 days after the incident (R. 246:20-23), **add. A**. Thereafter, Lewis consistently identified defendant from a lineup held approximately one month after the photo array, and ultimately, at trial (R. 246:20-23), **add. A,** (R. 247:155-156). Any arguable discrepancies between Lewis's description of defendant and his appearance at the time of his arrest, do not render Lewis's identifications inadmissible, but bear on his credibility and weight the jurors may give the identification testimony. ***State v. Mincy***, 838 P.2d 648, 658 (Utah App. 1992), ***cert. denied***, 843 P.2d 1042 (Utah 1992); ***State v. Perry***, 899 P.2d 1232, 1234-35 (Utah App. 1995) (upholding eyewitness identification describing Perry as clean shaven, 5'6" to 5'7" tall and weighing approximately 150 pounds, when at the time of his arrest Perry was 5'9" tall, 170 pounds and had a slight mustache). The jury was instructed accordingly (***see*** Jury Instructions # 6 & 26) (the jury instructions are not enumerated in the record, but are contained in a manilla envelope marked "Exhibits").

(3) Lewis's Second Identification of Defendant From a Lineup Procedure Was Not Unduly Suggestive

The final and most critical ***Ramirez*** factor concerns the suggestibility of the showup identification in that case. In ***Ramirez***, police informed the eyewitness *prior* to the showup that they had located an individual that fit one of the robbers' description. ***Ramirez***, 817 P.2d at 784. When the ***Ramirez*** witnesses arrived at the showup, Ramirez, a dark-complexioned Apache Indian, was handcuffed to a chain link fence. ***Id.*** He was the only suspect, and the spotlights and headlights of patrol cars were turned on him. ***Id.*** Ultimately, although troubled by the "blatant suggestiveness" of the ***Ramirez*** showup, the supreme court determined that eyewitness's identification in ***Ramirez*** was constitutionally reliable. ***Id.*** at 784.

The instant case does not involve a showup identification; however, defendant complains that Lewis's *second* identification of him at the lineup was tainted by the fact that police told Lewis after the earlier photo array identification that he had identified the same individual they suspected as the robber/kidnapper. Aplt. Br. at 32. Defendant's claim lacks merit. Indeed, the circumstances surrounding the lineup here do not begin to approach the problematic showup which was upheld in ***Ramirez***. 817 P.2d at 784. The only arguably suggestiveness defendant identifies is the fact that *after* the photo array, but before the lineup, Lewis was told he had correctly identified the suspect from the photo array. Aplt. Br. at 32. Based on ***Ramirez***, that tangential statement is by itself is insufficient to demonstrate that the lineup identification was constitutionally tainted.

Moreover, any arguable suggestiveness was negated here when *prior* to the lineup identification, Lewis was told there was a "possibility" that neither suspect would be in the lineup (R. 246:24).

The trial court's determination that Lewis's identifications of defendant, from a photo array and from a subsequent lineup, were constitutionally reliable is eminently reasonable and should therefore be upheld. The identification evidence was properly admitted for the jury's evaluation.

CONCLUSION

Defendant's convictions by a jury for aggravated robbery and aggravated kidnapping should be affirmed.

RESPECTFULLY SUBMITTED on 3 July 2000.

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CERTIFICATE OF MAILING

I certify that an accurate copy of the foregoing ***BRIEF OF APPELLEE*** was mailed, postage pre-paid, on 3 July 2000, to the following:

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Addenda

Addendum A

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

THE STATE OF UTAH,

PLAINTIFF,

VS.

JACOB ROSS HALE,

DEFENDANT.

CASE NO. 991906795 FS

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(DAY ONE, JURY TRIAL)

BEFORE THE HONORABLE LESLIE A. LEWIS

SALT LAKE CITY, UTAH

AUGUST 23, 1999

REPORTED BY GAYLE B. CAMPBELL, RPR, CSR

AUGUST 23, 1999 SALT LAKE CITY, UTAH

P R O C E E D I N G S

* * *

(COURT RESUMES SESSION NOW AT 1:20 P.M. WITH COUNSEL IN CHAMBERS.)

MS. REMAL: I AM INFORMED THERE'S A POTENTIAL PROBLEM.

THE COURT: OH, NO.

MS. REMAL: WHEN I WENT BACK TO THE OFFICE AT LUNCHTIME, MY COLLEAGUE KIM, CLARK, WHO IS WITH US NOW, TOLD ME THAT THIS MORNING WHILE SHE WAS IN THE AREA OF THE ELEVATORS DOWNSTAIRS SHE OVERHEARD SOMETHING SHE THOUGHT I SHOULD KNOW.

THE COURT: WHAT IS IT?

MS. REMAL: APPARENTLY WHILE THE PANEL WAS STANDING THERE WAITING FOR THE ELEVATOR, THERE WAS A BRIEF CONVERSATION WHERE THEY WERE HELD, AND THEY WERE HELD TO GO TO JUDGE LEWIS'S COURTROOM. FROM SOMEWHERE BEHIND MS. CLARK, WHICH WOULD HAVE BEEN THE AREA OF THE METAL DETECTORS, SHE HEARD A VOICE SAYING, "GUILTY, GUILTY, GUILTY, GUILTY."

THE COURT: WHO SAID THAT?

MS. CLARK: I CAN'T TELL YOU, YOUR HONOR. THE GUYS THAT DO THE INSPECTION WHEN YOU COME IN

WERE BEHIND ME. THERE WAS THREE OF THEM THERE THIS MORNING. I JUST DIDN'T TURN AND LOOK. I DIDN'T WANT TO MAKE A BIG DEAL ABOUT IT AND MAKE IT WORSE THAN IT COULD HAVE BEEN.

THE COURT: I WOULD LIKE TO KILL THEM.

MS. CLARK: I WOULD THINK THEY WOULD KNOW BETTER.

THE COURT: BUT WE DON'T KNOW WHO THEY WERE?

MS. CLARK: I CAN REMEMBER TWO OF THE THREE.

THE COURT: OKAY. WELL, ALL I CAN DO IS ASK IN A VERY CAREFUL WAY WHETHER THEY HEARD ANYTHING FROM THE BAILIFFS AT THE DOOR, JOKING ABOUT GUILT OR INNOCENCE, OR ANYTHING OF THAT NATURE.

MY GUESS IS THEY DIDN'T HEAR ANYTHING, OR MY HOPE IS, LET ME TELL YOU, THAT WON'T HAPPEN AGAIN. I'M APPALLED.

MS. CLARK: I WAS SPEAKING TO OFFICER ROWLEY, THINKING I'M GOING TO TAKE THE STAIRS BECAUSE IT WAS A BIG PANEL.

THE COURT: THIS IS GOING TO A A REAL BROUHAHA. THIS APPALLS ME. IF YOU HAVE LOW I.Q. PEOPLE, IT'S ONE OF THE THINGS THAT CAN OCCUR. BUT YOU CERTAINLY DO NOT EXPECT THIS.

WERE THERE ANY WOMEN BAILIFF'S THERE? IT WAS ALL MEN?

MS. CLARK: THREE GUYS. THERE WEREN'T ANY WOMEN.

THE COURT: IF THIS PANEL INDICATES IN ANY WAY THEY HEARD, WE'LL DEAL WITH IT. BUT THEY WILL BE PAYING THE COST OF THE JURY PERSONALLY. THAT INCENSES ME. DON'T THEY HAVE ANY JUDGMENT?

MS. CLARK: I DON'T KNOW IF OFFICER ROWLEY HEARD IT.

THE COURT: WE HAVE MADE A RECORD OF WHAT YOU SAID. I WILL ASK HIM. BUT THIS WILL TAKE CARE OF IT. WE'LL GET ON IT THE RECORD RIGHT AWAY. THANK YOU, KIM FOR --

MS. CLARK: DO YOU WANT ME TO STAY?

THE COURT: I DON'T THINK SO, UNLESS COUNSEL DO. I THINK YOU'VE MADE CLEAR WHAT HAPPENED ON THE RECORD. I AM JUST SORRY IT HAPPENED. BUT GIVEN THE CALIBER OF PEOPLE WE HIRE AT THE DOORS--

LET'S GO IN AND SEE WHAT WE CAN DO. NO ONE WANTS A MISTRIAL, I AM ASSUMING, IF WE CAN AVOID IT.

MS. REMAL: NO, NOT IF WE CAN AVOID IT. BUT I'M CONCERNED IF ANYONE OVERHEARD IT.

THE COURT: WE'LL GO SEE.

(PROCEEDINGS PROCEED IN OPEN COURT.

COUNSEL PRESENT, DEFENDANT PRESENT.)

THE COURT: YOU ARE WELCOME TO BE SEATED AGAIN. THANK YOU. FOR THE RECORD, I HAVE PUT THE QUESTION JUST NOW TO OFFICER ROWLEY, WHO HEARD NOTHING, BUT INDICATED HE WAS AT THE BACK OF THE JURY, SORT OF SHEPHERDING THEM FORWARD. SO THAT'S AN INDICATION THIS WAS NOT HEARD BY EVERYONE. NOTHING MORE THAN THAT.

(JURY BROUGHT INTO COURTROOM AND PROCEEDINGS CONTINUE.)

THE COURT: TAKE YOUR ORIGINAL SEATS, IF YOU WOULD, UNLESS YOU'VE ALL DECIDED TO SWITCH PLACES.

ALL RIGHT. THANK YOU, LADIES AND GENTLEMEN. GOOD TO SEE YOU BACK. I HOPE YOU HAD A GOOD LUNCH. LET ME JUST ASK YOU: DID ANY OF YOU DISCUSS THE CASE OR FORM ANY OPINIONS OVER THE NOON HOUR, OR ALLOW ANYONE ELSE TO DISCUSS IT WITH YOU?

IF ANYONE DID, PLEASE RAISE YOUR HANDS. NO RAN ARE RAISED. ONE ADDITIONAL QUESTION: IT'S COME TO MY ATTENTION THAT ONE OR TWO OF THE BAILIFFS THAT DO THE MONITORING AT THE DOORS ON THE MAIN FLOOR BY THE METAL DETECTORS MAY HAVE MADE SOME JOKING REFERENCE TO CASES IN GENERAL AS YOU ALL WERE WALKING BY TO GET TO THE ELEVATORS.

DID ANYONE HEAR ANY REFERENCE TO THIS CASE, GUILT, NON-GUILT, INNOCENCE, WHATEVER, FROM ANY OF THE OFFICERS AT THE METAL DETECTOR THIS MORNING?

DID ANYONE HEARING ANYTHING? IF SO, RAISE YOUR HANDS. OUR THIRD PROSPECTIVE JUROR HAS RAISED HER HAND. AND THAT'S MS. MURRAY. MS. MURRAY, WHAT DO YOU RECALL HEARING.

JUROR: SOMETHING TO THE EFFECT OF-- "THEY ARE GUILTY." I'M NOT SURE WHO SAID IT, BUT SOMEBODY YELLED IT OUT.

THE COURT: DO YOU UNDERSTAND THAT THIS WAS JUST A JOKING COMMENT.

JUROR: YES.

THE COURT: YOU DID NOT UNDERSTAND IT TO BE PERTAINING TO THIS OR ANY OTHER PARTICULAR CASE; IS THAT RIGHT.

JUROR: YES.

THE COURT: FROM YOUR EXPRESSION, MS. MURRAY, I'M ASSUMING THAT YOU FELT IT WAS KIND OF A SILLY REMARK AND DID NOT PERTAIN TO THIS CASE; IS THAT CORRECT?

JUROR: YES.

THE COURT: HAS THAT IN ANY WAY INTERFERRED WITH YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE.

JUROR: NO.

THE COURT: AND YOU DID NOT UNDERSTAND IT TO REFER TO THIS CASE IN PARTICULAR; IS THAT CORRECT?

JUROR: THAT'S CORRECT.

THE COURT: ALL OF YOU SHOULD UNDERSTAND THAT THE BAILIFFS AND THE OFFICERS WHO WERE AT THE MENTAL DETECTORS HAD HAVE NO IDEA WHICH CASES ARE BEING TRIED IN WHICH COURT.

AND EVEN IF THEY DID KNOW WHICH CASES ARE BEING TRIED IN WHICH COURTS, THEY KNOW NOTHING ABOUT ANY OF THE CASES. IT WOULD BE TO SAY THERE ARE ABOUT FOURTEEN JUDGES ON THIS FLOOR, AND THAT SOME OF THE CASES ARE CRIMINAL, SOME OF THEM ARE CIVIL. THEY ALL INVOLVE DIFFERENT FACTS.

AND THERE CERTAINLY IS NEVER ANY CONVERSATION BY THIS COURT OR MY STAFF WITH ANY OF THOSE PEOPLE, NOR DO THEY SHARE COPIES OF THE PLEADINGS OR ANYTHING OF THAT NATURE.

COUNSEL, YOU CERTAINLY HAD NO CONVERSATION WITH ANYONE AT THE PORTALS, ABOUT THIS CASE OR ANY OTHER?

MR. PARKER: THE STATE DID NOT, YOUR HONOR.

MS. REMAL: I DID NOT.

THE COURT: ALL RIGHT. DO YOU WANT ME TO

ASK ANY FOLLOW-UP QUESTIONS OF THE JURORS, MR. PARKER.

MR. PARKER: NO, YOUR HONOR.

THE COURT: MS. REMAL?

MS. REMAL: ONLY, YOUR HONOR, WHETHER OR NOT THERE WAS ANY RESPONSE BY ANYBODY TO WHAT MS. MURRAY OVERHEARD BY ANOTHER BAILIFF OR ANY OTHER PERSON.

THE COURT: ALL RIGHT. MS. MURRAY, DID YOU HEAR ANY OTHER COMMENT IN RESPONSE TO THAT, OR IN ADDITION DO THAT.

JUROR: NO.

THE COURT: BY ANYBODY?

JUROR: NO.

THE COURT: AND YOU DIDN'T DISCUSS THIS WITH ANY OF YOUR FELLOW JURORS, OBVIOUSLY. JUST SORT OF THOUGHT WAS A SILLY COMMENT THAT YOU HEARD, AND IT WAS NOT TAKEN SERIOUSLY BY YOU IS WHAT I UNDERSTAND YOU TO BE SAYING; IS THAT CORRECT?

JUROR: YES.

THE COURT: ALL RIGHT. AND AGAIN, LET ME TELL EACH AND EVERY ONE OF YOU THAT YOU KNOW THE WORK THAT OCCURS IN THIS BUILDING, WHETHER IT'S A CIVIL CASE OR CRIMINAL CASE, OR DOMESTIC CASE, IT'S IMPORTANT WORK, AND I THINK THAT SOMETIMES SOME

PEOPLE DON'T GIVE IT THE SERIOUSNESS IT DESERVES BECAUSE THEY TRY TO LIGHTEN THE MOOD. THE REFERENCE MS. MURRAY HEARD WAS NOT IN CONNECTION WITH THIS CASE IN PARTICULAR, AND IT SOUNDS LIKE IT WAS AN ABSOLUTELY STUPID, INSENSITIVE REMARK, CERTAINLY SHOULD NEVER HAVE BEEN MADE.

BUT I THINK IT'S SAFE TO SAY THAT IT HAD NOTHING TO DO WITH THIS CASE, AND THAT IT SHOULD NEVER HAVE BEEN MADE IN ANY EVENT.

BUT I WANT TO BE SURE THAT ALL OF YOU UNDERSTAND THAT IF YOU FEEL ITS IMPACTS, YOU, MS. MURRAY, OR ANY OF YOU IN HEARING ABOUT IT, I WANT TO KNOW NOW. DO ANY OF YOU FEEL LIKE IT'S HAD ANY EFFECT ON YOU?

(NO VERBAL RESPONSE.)

THE COURT: ALL RIGHT. AND THEY'RE SHAKING THEIR HEADS IN THE NEGATIVE.

IS THERE ANYTHING FURTHER, MS. REMAL, THAT YOU WOULD LIKE ME TO ASK ABOUT THAT.

MS. REMAL: NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT. AND I WILL MAKE SURE THAT THE PEOPLE AT THE PORTALS UNDERSTAND THAT THEY NEED TO BE CAREFUL ABOUT ANY LEVITY OR ATTEMPTS AT LEVITY, AND THAT IS NOT HUMOROUS IN A GENERIC FORM AT ALL. ALTHOUGH IT WAS NOT APPARENTLY

IN RELATION TO THIS CASE, ABOUT WHICH NO ONE COULD OF HAD HAD ANY INFORMATION. IT'S INAPPROPRIATE.

MS. REMAL: MAY WE APPROACH THE BENCH?

THE COURT: YES, CERTAINLY.

(BENCH CONFERENCE OFF THE RECORD.)

THE COURT: LADIES AND GENTLEMEN, I'M GOING TO SUGGEST THAT WE TAKE A SHORT BREAK AT THIS MOMENT. AND I'M GOING TO ASK THE BAILIFF TO ESCORT YOU TO THE JURY ROOM, AND ASK YOU NOT TO DISCUSS THE CASE, EVEN WITH ONE ANOTHER. I THINK IT WILL ONLY TAKE US ABOUT FIVE OR TEN MINUTES. AND YOU'D COME RIGHT BACK AFTER THAT.

BAILIFF: SURE.

(JURY EXITS COURTROOM.)

THE COURT: I'M GOING TO ASK EVERYONE EXCEPT MR. BELTRAN TO LEAVE THE COURTROOM, PLEASE, OTHER THAN COUNSEL AND THE DEFENDANT. IF YOU WOULD PLEASE STEP OUT. YOU DON'T HAVE TO, DETECTIVE TIMMERMAN. OKAY.

(COURTROOM CLEARED AS ORDERED.)

YOU DON'T HAPPEN TO KNOW, STEVE, WHO WAS DOWNSTAIRS AT THE DOORS THIS MORNING?

BAILIFF: THE OFFICERS THAT ARE DOWN THERE, NO.

THE COURT: (ON PHONE) THIS THE JUDGE

LEWIS. HOW ARE YOU DOING? GOOD. I NEED TO KNOW WHO WAS AT THE DOOR, AND I GUESS WHAT WE'RE TALKING ABOUT IS THE DOORS ON THE MAIN FLOOR AT THE EAST ENTRANCE AS YOU COME IN FROM THE DOMED AREA, THAT AREA, THIS MORNING.

AND I NEED TO HAVE THEM COME UP TO MY COURTROOM NOW. THERE IS A REAL ISSUE WITH THIS JURY. ONE OF THE ATTORNEYS IS ASKING FOR A MISTRIAL BECAUSE APPARENTLY AT LEAST ONE OF THE BAILIFFS AT THE DOORS MADE SOME COMMENT ABOUT "GUILTY, GUILTY, GUILTY" AS MY JURORS WERE PASSING BY THIS MORNING. I WANT THE THREE OFFICERS UP HERE NOW, TO SEE IF WE NEED TO DECLARE A MISTRIAL.

THIS WAS THIS MORNING AS THE JURORS WERE BEING BROUGHT UP TO MY COURTROOM ON THE ELEVATORS, AND THERE WERE THREE MALE BAILIFFS.

I DON'T KNOW WHO THEY WERE. SO IF THERE'S ANY QUESTION, I WANT THEM ALL BROUGHT UP. AND I NEED TO HAVE THAT DONE RIGHT NOW. OKAY? THANK YOU.

I WANT THEM RIGHT IN MY COURTROOM. I HAVE GOT A A JURY WAITING, AND I'M LOOKING AT A MISTRIAL ISSUE. THANKS. BYE.

(COURT CONCLUDES PHONE CONVERSATION.)

THE COURT: THIS OF COURSE UPSETS ME, BUT YOU SHOULD UNDERSTAND, MR. HALE, THAT YOUR ATTORNEY

HAS RAISED AN IMPORTANT ISSUE FOR US TO DEAL WITH.

I DON'T WANT FOR YOU TO BE PREJUDICED IN ANY WAY. NOW, FOR WHAT IT'S WORTH, AND THIS IS NOT THE LAST WORD ON THE SUBJECT, BECAUSE I WANT TO HEAR FROM THESE THREE OFFICERS. I AM APPALLED THAT THEY WOULD HAVE MADE SUCH A COMMENT, ANY OF THEM, OR ALL OF THEM. BUT I HAVE TALKED TO OFFICER HALL, WHO IS THE BAILIFF TODAY, AND HE WAS DOWN THERE BASICALLY BRINGING UP THE JURORS. HE HEARD NOTHING.

IS THAT A FAIR COMMENT, OFFICER HALL?

BAILIFF: THAT'S RIGHT.

THE COURT: HE WAS AT THE BACK, AS I UNDERSTAND IT, SO IT WAS AS HE WAS SHEPHERDING THE JURORS UP. OBVIOUSLY, ONLY ONE OF THEM HEARD ANYTHING. AND THAT JUROR, TO MY MIND, DID NOT TAKE IT SERIOUSLY, DID NOT EQUATE IT WITH THIS CASE AT ALL.

BUT I DO WANT TO MAKE SURE THAT WE HAVE AN ADEQUATE UNDERSTANDING OF WHAT WAS SAID, SO THAT WE CAN PUT IT INTO PERSPECTIVE.

BUT IT'S IMPORTANT FOR YOU TO UNDERSTAND, MR. HALE, THAT YOUR ATTORNEY HAS MADE A MOTION THAT SHE FEELS IS APPROPRIATE, AND I THINK IT'S AN APPROPRIATE MOTION TO BE BROUGHT BEFORE THE COURT. I HAVE NOT DECIDED HOW I'M GOING TO RULE, BUT I

WANTS TO SEE WHAT THESE OFFICERS HAVE TO SAY FOR THEMSELVES. WE'LL BRING THEM UP AND TRY TO GLEAN A BIT MORE INFORMATION. BUT IF I WERE TO GRANT THE MOTION FOR A MISTRIAL, MR. HALE, YOU'D GO BACK TO JAIL, AND THIS WOULD DELAY YOUR TRIAL. I DON'T KNOW HOW LONG IT WOULD DELAY THE TRIAL.

LET'S LOOK, MICHELLE, AND SEE WHEN WE COULD DO IT. WE CAN'T DO IT THIS WEEK BECAUSE WE CAN'T DO THE TRIAL IN ONE DAY, AND ALL WE SET ASIDE WERE TWO DAYS. LET ME THINK A MINUTE. WHAT WERE WE DOING WEDNESDAY OF THIS WEEK?

THE CLERK: WE HAVE A MOTION TO SUPPRESS HEARING ON IN-CUSTODY MATTER. MINOR'S SETTLEMENT, ONE HOUR MOTION FOR SUMMARY JUDGMENT,

THE COURT: SO WE'VE MATTERS ALL DAY THEN.

THE CLERK: YES.

THE COURT: WHAT HAVE WE GOT NEXT MONDAY.

THE CLERK: AN IN-CUSTODY CRIMINAL CASE. SET FOR TWO DAYS.

MR. PARKER:

THE COURT: ALL RIGHT.

MS. REMAL: YOUR HONOR, BEFORE WE DISCUSS NEXT WEEK, I WILL BE ON VACATION. MY NIECE IS FLYING IN THURSDAY NIGHT, AND WE'LL BE GONE NEXT WEEK.

THE COURT: SO THAT IS NOT VIABLE. I AM NEVER GOING TO DENY AN ATTORNEY VACATION, PARTICULARLY ONE WHO DOES CRIMINAL WORK, WHO I'M EXPERIENCED ENOUGH TO KNOW BURNS THE CANDLE AT BOTH ENDS AND WORKS VERY VERY HARD. I'VE NEVER DENIED ANY LAWYER A VACATION; CERTAINLY NOT A CRIMINAL LAWYER.

THE CLERK: SEPTEMBER 7 OR SEPTEMBER 27 BOTH OF THOSE OR NOT IN-CUSTODY.

THE COURT: SEPTEMBER 7 IS AVAILABLE, WHICH IS A COUPLE WEEKS AWAY, TO STATE THE OBVIOUS.

SO IF WE CONTINUE IT, THAT'S WHAT WE'RE LOOKING AT DOING NOW. I'M GOING TO WAIT, MR. HALE, TO ASK HOW YOU FEEL ABOUT THIS UNTIL WE'VE HEARD FROM THE OFFICERS IN QUESTION. THEY WILL BE PAYING THE COSTS OF THE JURY ALSO, IF WE NEED TO DO A MISTRIAL.

AND THERE WILL BE REPERCUSSIONS IN TERMS OF HOW THEY ARE TREATED. AND THAT'S NOTHING TO DO WITH THIS CASE, BUT I WANT TO GIVE YOU A CHANCE TO THINK ABOUT IT. WITH THAT IN MIND, EVERY DAY IN JAIL IS, I AM SURE, A PERIOD OF TIME THAT FEELS A LOT LONGER THAN 24 HOURS. AND I WANT YOU TO HAVE A CHANCE TO VISIT WITH MS. REMAL ABOUT HER PERSPECTIVE ON IT, BECAUSE SHE'S VERY EXPERIENCED AND WISE ATTORNEY.

AND, FRANKLY, IF SHE'S MAKING A MOTION FOR A MISTRIAL, I MAY WELL GRANT IT.

(OFFICERS ENTER COURTROOM.)

THE COURT: OKAY. LET'S SEE, WE HAVE TWO OFFICERS PRESENT. CAN I GET YOU GENTLEMEN TO STATE YOUR NAMES FOR THE RECORD.

OFFICER: NEIL TWITCHELL.

THE COURT: ALL RIGHT.

OFFICER: MANUEL GALLOWAY.

THE COURT: MR. TWITCHELL AND MR. GALLOWAY, WERE YOU AT THE DOORS THIS MORNING WHEN MY JURY PASSED BY?

OFFICER GALLOWAY: YES.

OFFICER TWITCHELL: YES.

THE COURT: DID EITHER OF YOU SAY ANYTHING IN A JOKING MANNER OR A SERIOUS MANNER THAT COULD HAVE BEEN OVERHEARD BY MY JURY OR SOMEONE IN MY JURY ABOUT "GUILTY, GUILTY, GUILTY"?

OFFICER GALLOWAY: JOKING MANNER. CONVERSATION BETWEEN ME AND HIM.

THE COURT: WHO SAID IT?

OFFICER TWITCHELL: I DID.

THE COURT: OFFICER TWITCHELL, WHAT EXACTLY DID YOU DO?

OFFICER TWITCHELL: I SAID TO OFFICER

GALLOWAY, "YOU KNOW, IT'S A GOOD THING WHEN THEY PUT THE JURY TOGETHER THAT THEY DON'T INSTRUCT THEM ON GUILTY, GUILTY, GUILTY, GUILTY."

THE COURT: WHAT DID YOU MEAN?

OFFICER TWITCHELL: PARDON ME?

THE COURT: I DON'T EVEN UNDERSTAND WHAT YOU SAID.

OFFICER TWITCHELL: THE JURY WAS WALKING BY. AND I SAID, "IT'S A GOOD THING WHEN THEY START THE JURY OUT THAT THEY DON'T START THEM OUT BY SAYING, REMEMBER, GUILTY GUILTY GUILTY GUILTY, SO THE PEOPLE--

OFFICER GALLOWAY: IT DIDN'T PERTAIN--

OFFICER TWITCHELL: IT'S GOOD THING THEY DON'T START THE JURIES OUT-- OTHERWISE-- IS WHAT WE WERE SAYING. HE IS ASKING ME, WHY DO WE HAVE SO MANY JURORS WHEN THEY TAKE THEM UP TO START WITH.

THE COURT: DID YOU REFER TO THIS CASE?

OFFICER GALLOWAY: NO.

OFFICER TWITCHELL: NO. I DIDN'T KNOW WHO THE JURY WAS GOING BY.

THE COURT: SO YOU WEREN'T REFERRING TO--

OFFICER TWITCHELL: I HAD NO IDEA WHO THE JURY WAS FOR OR WHAT IT WAS PERTAINING-- WHO THE JURY WAS.

THE COURT: THE NATURE OF THE CHARGES?

OFFICER TWITCHELL: NO.

THE COURT: IT WAS IN THE CONTEXT OF-- SAY IT AGAIN. REPEAT IT AGAIN, IF YOU WOULD.

OFFICER TWITCHELL: I SAID, "IT'S A GOOD THING THEY DON'T START THE JURY OUT WHEN THEY ARE DOWN IN THE ROOM BY SAYING, 'REMEMBER, GUILTY, GUILTY, GUILTY, GUILTY.'"

THE COURT: ALL RIGHT. AND OFFICER GALLOWAY, IS THAT THE WAY YOU REMEMBER IT?

OFFICER GALLOWAY: IT IS, MA'AM.

THE COURT: DID YOU MAKE ANY RESPONSE?

OFFICER GALLOWAY: I JUST SAID -- I WAS LAUGHING. I WENT, "GUILTY, GUILTY, TO HIM." THAT'S IT.

THE COURT: YOU SAID, "GUILTY, GUILTY" BACK.

OFFICER GALLOWAY: YES. HE SAID, "GUILTY, GUILTY, GUILTY." I GOES, "GIILTY, GUILTY, GUILTY," NOT LOOKING AT THE JURORS OR NOTHING.

THE COURT: DO YOU UNDERSTAND, FIRST OF ALL, THE RAMIFICATIONS THAT THIS HAS? DO YOU UNDERSTAND THAT ONE OF MY JURORS HEARD THIS?

OFFICER TWITCHELL: NO, I DID NOT.

THE COURT: I AM TELLING YOU NOW. DO YOU

UNDERSTAND THAT A LAWYER OVERHEARD IT AND CALLED IT TO OUR ATTENTION? DO YOU UNDERSTAND THE SIGNIFICANCE OF THIS?

OFFICER TWITCHELL: I CAN SEE WHERE THAT WOULD BE A PROBLEM.

THE COURT: IT'S A HUGE PROBLEM. AND YOU BOTH STRIKE ME AS INTELLIGENT OFFICERS WHO ARE VERY CONCERNED ABOUT DOING A GOOD JOB. I HAVE SEEN ENOUGH OF BOTH OF YOU TO KNOW YOU ARE EXTREMELY CONSCIENTIOUS IN DOING YOUR DUTY, AND YOU ARE VERY GENTEEL AND CIVIL WITH THE PUBLIC, AND WITH ATTORNEYS, AND THE PEOPLE WHO USE THE BUILDING. BUT THIS IS A VERY SERIOUS MATTER.

MS. REMAL, IT SEEMS TO BE CLEAR NOW THAT THIS WAS IN THE CONTEXT OF GENERAL COMMENT ABOUT HOW IMPORTANT IT WAS THAT JURORS NOT BE TOLD ANYTHING ABOUT NOT GUILTY OR GUILTY GUILTY GUILTY, BUT APPARENTLY THOSE WORDS WERE USED. APPARENTLY THE ONE JUROR WHO HEARD IT HEARD THE WORD GUILTY. I DON'T-- THE JUROR WAS CLEAR THAT SHE DID NOT FORM AN OPINION AS A RESULT OF THAT, NOR DID SHE CORRELATE THOSE REMARKS OR THOSE WORDS-- I SHOULD SAY, WITH THIS CASE, OR TAKE THEM TO HEART.

ALL RIGHT. DO YOU HAVE A MOTION?

MS. REMAL: MAY I CONFER WITH MR. HALE FOR

JUST A MOMENT HERE.

THE COURT: YES. YOU CERTAINLY MAY.

(COUNSEL CONFERS WITH DEFENDANT OFF THE RECORD.)

THE COURT: DETECTIVE BELTRAN, IF YOU WOULD DO THE SAME THING WITH THIS INDIVIDUAL.

MS. REMAL: YOUR HONOR, I DO HAVE A MOTION.

THE COURT: THE MOTION IS?

MS. REMAL: IT IS MY MOTION FOR A MISTRIAL, YOUR HONOR, BASED ON THE OFFICERS' UNDERSTANDING. IT DOESN'T APPEAR AS THOUGH THEY WERE INTENTIONALLY OR MALICIOUSLY TRYING TO CAUSE A PROBLEM. UNFORTUNATELY, USING THE WORDS "GUILTY, GUILTY, GUILTY", THOSE ARE THE WORDS THAT THE JUROR OVERHEARD. ALTHOUGH SHE INDICATED THAT SHE DIDN'T TAKE IT SERIOUSLY.

MY CONCERN WITH JURORS, ALWAYS, AND I KNOW THE APPELLATE COURTS HAVE TALKED ABOUT THIS JUST IN TERMS OF VOIR DIRE, IS THAT WE KNOW THAT PEOPLE TRY VERY HARD TO FOLLOW INSTRUCTIONS, WE KNOW THEY TRY VERY HARD TO BE GOOD JURORS, BUT THAT THERE'S SOMETIMES INFLUENCES THAT HAVE AN UNCONSCIOUS OR SUBCONSCIOUS INFLUENCE ON PEOPLE, EVEN THOUGH THEY MAY TRY TO SET THINGS ASIDE.

THIS IS A CASE WHERE THERE'S AN

IDENTIFICATION ISSUE, AND MY CONCERN IS THAT IF IT COMES TO A CLOSE DECISION BY JURORS, THAT THEY MAY BE INFLUENCED BY THAT. PARTICULARLY THE JUROR WHO OVERHEARD. MY SPECIAL CONCERN IS THAT THIS IS NOT A COMMENT MADE BY SOME LAY PERSON, CITIZEN, THEY HAVE NO IDEA WHO THEY ARE, BUT BY UNIFORMED OFFICERS WHO HAVE AN OFFICIAL CAPACITY HERE IN THIS BUILDING. NOT AT PART OF OUR STAFF, BUT IN THE BUILDING.

AND MY CONCERN IS THAT THEY MAY THINK THE OFFICERS MUST KNOW SOMETHING, THEY WORK IN THIS BUILDING EVERY DAY, THEY SEE WHAT HAPPENS. AND FOR THOSE REASONS, I MOVE FOR A MISTRIAL.

THE COURT: MR. PARKER, DO YOU WANT TO RESPOND?

MR. PARKER: WELL, I DO, YOUR HONOR. I ACKNOWLEDGE, FIRST OF ALL THE LAW IS AS MS. REMAL INDICATES. AND THAT IS, THAT THERE IS SOME FEELING, I BELIEVE, IN THE COURTS THAT IF THERE IS THE APPEARANCE OF EVIL, THAT THINGS ARE STRUCK.

THE COURT: FIRST OF ALL, I'M NOT SURE YOU CAN DEEM WHAT HAPPENED AS THE APPEARANCE OF EVIL, BUT I GUESS I UNDERSTAND WHAT YOU'RE SAYING.

MS. REMAL HAS MADE IT CLEAR THAT SHE DOES NOT UNDERSTAND THAT THE COMMENT OR COMMENTS WERE MADE IN ANY KIND OF MALICIOUS MANNER. FURTHER, ONLY

ONE JUROR HEARD IT. THE JUROR WHO HEARD IT WAS VERY CLEAR, AS I UNDERSTAND IT, AND WE CAN CERTAINLY QUESTION FURTHER, THAT THEY DID NOT UNDERSTAND THE REMARK TO HAVE ANY BEARING ON THIS CASE. THAT IT HAD NOT IMPACTED HER FEELINGS ABOUT THE CASE AT ALL, THAT SHE UNDERSTOOD -- AT LEAST IT'S MY PERCEPTION OF WHAT SHE'S SAID, AND WE CAN CLARIFY THIS, TO BE SORT OF A LIGHTHEARTED COMMENT THAT WAS NOT RELATED TO THIS CASE.

I INTERRUPTED YOU. GO ON.

MR. PARKER: I APPRECIATE THE COURT'S ARGUMENT. BUT THAT'S WHERE I WAS GOING. I WANTED TO INDICATE THAT I DIDN'T FEEL THAT WAS A CIRCUMSTANCE THAT AMOUNTED TO THAT.

IN FACT, IN A BROAD WAY I AM WORRIED THAT THE PREJUDICE, IF ANY, THAT COMES OUT OF THIS ACTUALLY REFERS TO THE STATE. AND THE MANNER THAT IT WAS TAKEN BY THIS JUROR, I THINK THAT, IF ANYTHING, THAT SHE COULD WORRY ABOUT THE CREDIBILITY OF OFFICERS IN GENERAL. NOT SPECIFICALLY ABOUT THE DEFENDANT.

I GUESS MY RESPONSE IS, THAT, ONE, AS THE COURT BROUGHT OUT, IT WASN'T DIRECTED AT ALL ABOUT THIS DEFENDANT. THEY HAD NO KNOWLEDGE OF IT. IT WASN'T AN INTENTIONAL COMMENT, IT WASN'T

INTENTIONALLY MEANT, IT WAS JUST AN ACCIDENT.

MS. REMAL: IT WAS.

THE COURT: IT WAS NOT INTENDED TO IN ANY WAY INTERFERE WITH JUSTICE, CLEARLY. THE OFFICERS ARE PROFESSIONALS WHO HAD NO INTENTION OF DOING ANY HARM, BUT IT WAS MADE INTENTIONALLY. THAT IS TO SAY, CERTAINLY THE WORDS CAME OUT OF THE THEIR MOUTHS ON PURPOSE.

MR. PARKER: CERTAINLY. AND I'M NOT INDICATING THAT IT WAS OTHER THAN THAT. BUT IT WAS NOT LIKE THE OFFICERS HAD TRIED TO TALK TO THE PANEL. IT WAS NOT LIKE THE OFFICERS HAD TRIED TO DO SOMETHING SO DELIBERATELY SO THE PANEL COULD HEAR AND INFLUENCED. IT WAS ACCIDENTAL, OR INCIDENTAL.

IT WAS SURELY A STUPID COMMENT AND SURELY INAPPROPRIATE, BUT IN THE CONTEXT OF WHO THEY ARE, IN THE CONTEXT OF NOT KNOWING OUR PANEL, NOT KNOWING OUR FACTS, AND THAT OF THE JURORS THEMSELVES, THE ONLY ONE THAT HEARD IT TOOK IT VERY LIGHTLY, SAID THAT IT WOULD NOT INFLUENCE HER, TOOK IT ALMOST AS AN INAPPROPRIATE JOKE.

I JUST DON'T THINK THAT EQUATES TO THE PREJUDICE IN THIS CASE THAT WOULD IN ANY WAY INFLUENCE HER DECISION OR HER ABILITY, REGARDLESS OF HOW CLOSE THE CASE IS.

THE COURT: WHAT DO YOU BELIEVE THE COURT'S REMARKS DID BY WAY OF HAVING AN IMPACT ON THIS? DO YOU BELIEVE THAT ANY HARM MAY HAVE BEEN AMELIORATED OR EXACERBATED?

MR. PARKER: I THINK THE COURT HANDLED IT APPROPRIATELY IN THE BROAD WAY IT WAS ADDRESSED.

AND THAT THE COURT'S INDICATION THAT THE COMMENT WAS SURELY A STUPID COMMENT THAT SHOULD NOT HAVE BEEN MADE. WE CAN SURELY MAKE A FURTHER INSTRUCTION IF THE COURT WANTS THAT. IN NO WAY CAN ANYONE CONDONE SUCH A THING, BUT I AM NOT SURE THAT'S APPROPRIATE. WE KEEP DIGGING THE PIT AND MAKING IT WORSE.

THE COURT: THE MORE WE FOCUS ON IT AT THIS POINT, THE MORE ATTENTION WE DRAW TO IT, IS MY CONCERN. LET ME SAY ONE MORE THING. I COULD HAVE TAKEN THE ONE JUROR WHO HEARD IT ASIDE, ON THE RECORD, TAKING OTHERS OUT. I PURPOSELY CHOSE NOT TO DO THAT, BECAUSE IT HAS BEEN MY EXPERIENCE THAT SOMETIMES PEOPLE DO NOT IMMEDIATELY RECALL HEARING SOMETHING, AND THEN WHEN THEIR MEMORIES ARE REFRESHED AS TO WHAT IT WAS, THEN THEY THINK, OH, YEAH, I HEARD THAT TOO. AND I DIDN'T WANT THAT ISSUE TO COME UP. I WANTED TO BE CLEAR THAT WHATEVER WAS HEARD BY ONE, NEEDED TO BE REVIEWED

WITH ALL OF THEM. SO IF THE ONE WOULD REFERENCE IT TO THE OTHERS, OR IF THAT OCCURRED, THAT THEY WOULDN'T-- THAT WE WOULD KNOW HOW IT WOULD IMPACT THEM. AND I WANTED TO BE SURE THAT WE PRESSED THEM TO FIND OUT WHAT THEY REMEMBERED.

I, FRANKLY, MADE VISUAL OBSERVATIONS, AS WELL AS MAKING A RECORD AS TO WHAT WAS SAID ABOUT THE EFFECT OF THE WORDS ON THE JURORS, AND THEY DID NOT APPEAR, IN MY OPINION -- AND I WILL ASK BOTH COUNSEL TO COMMENT ON THIS -- TO TAKE IT SERIOUSLY IN ANY WAY.

MR. PARKER, WHAT IS YOUR OPINION OF THE REFERENCE?.

MR. PARKER: I AGREE WITH THAT. NOT ONLY BECAUSE OF THE WORDS THE JUROR SPOKE, BUT THERE WAS NO SHAKING OF HEADS, NO EITHER SIGN DISGUST OR LIGHTHEARTEDNESS ON THE OTHER JURORS' PART. THEY JUST SAT AND LISTENED. I DON'T THINK IT AFFECTED THEM AT ALL.

THE COURT: MS. REMAL, DO YOU HAVE A PERSPECTIVE ON THIS FURTHER?

MS. REMAL: I DIDN'T NOTICE THE OTHER JURORS MAKING ANY PARTICULAR FACIAL EXPRESSIONS ONE WAY OR THE OTHER. WHICH SEEMS CONSISTENT WITH THEIR ANSWER THAT THEY HAVEN'T HEARD ANYTHING.

MS. REMAL: I HAVEN'T DECIDED HOW I AM GOING TO HANDLE THIS. I'M GOING TO THINK ABOUT IT FOR FIVE MINUTES BEFORE I MAKE MY RULING. THERE IS A TREMENDOUS COST INVOLVED WITH BRINGING IN A NEW PANEL. IT'S LIKE $18 PER JUROR, AND WE HAD SOMETHING LIKE 26 JURORS. AND THEN THERE'S MILEAGE COSTS, AND WE HAVE TO START ALL OVER AGAIN TO BRING INTO ANOTHER 26. MEANWHILE, THE DEFENDANT IS HELD IN JAIL ANOTHER TWO WEEKS, WHICH IS EXTREMELY UNFAIR TO THE DEFENDANT.

BUT MY UNDERSTANDING, MR. HALE, IS THAT THAT'S WHAT YOU WANT. YOU WANT TO HAVE A NEW JURY PANEL BROUGHT IN; IS THAT RIGHT?

THE DEFENDANT: YES, I BELIEVE SO.

THE COURT: WHY?

THE DEFENDANT: I JUST FEEL THAT THE ISSUE, WITH THE WAY IT WAS BROUGHT OUT, HOW EVERYONE-- IT'S JUST IT'S SO EMBEDDED IN THEIR MINDS.

THE COURT: WHO SAID THAT?

THE DEFENDANT: IF I WAS ON A JURY, AND I WOULD THINK THAT THEY ARE MAKING THIS BIG DEAL OF WHAT HAPPENED, AND THAT'S HOW I WOULD FEEL, THAT THERE MUST BE A REASON FOR IT. I JUST THINK IT WOULD AFFECT ME THAT WAY. AND I'M GOING ALONG WITH WHAT MY LAWYER FEELS, AS WELL. AND I'M PUTTING MY

TRUST IN HER HANDS.

THE COURT: AND SHE'S A FINE LAWYER. I UNDERSTAND WHERE YOU'RE COMING FROM. ALL RIGHT. THANK YOU, SIR. YOU UNDERSTAND THAT THIS IS GOING TO RESULT IN A DELAY IF I GRANT A MISTRIAL, BUT NOTHING IS MORE IMPORTANT THAN YOUR HAVING A FAIR TRIAL. DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, MA'AM.

THE COURT: ALL RIGHT. I'M GOING TO TAKE FIVE MINUTES AND THINK ABOUT THIS. I'M GOING TO ASK COUNSEL TO STEP OUT. I'M GOING TO ASK SARGEANT BELTRAN TO TAKE THE DEFENDANT BACK INTO THE HOLDING CELL. AND I'M GOING TO ASK THE OFFICERS TO REMAIN BEHIND, AS WELL AS THE COURT REPORTER AND MY TWO OFFICERS.

(COURTROOM CLEARED AS DIRECTED.)

THE COURT: OKAY. WITHOUT MILEAGE WE ARE TALKING ABOUT $468. PLUS THAT DOESN'T TAKE INTO ACCOUNT THE LAWYERS' TIME, MY TIME, COUNSEL'S TIME.

NOT ONLY THAT, BUT ALL THE PERSONNEL'S TIME. AND THEN IT'S NOT JUST $468, IT'S MILEAGE, WHICH I HAD NO IDEA WHAT IT IS. THEN IT'S DOUBLE BECAUSE WE'RE DOING IT ALL OVER AGAI IF I GRANT THE MISTRIAL.

WE HAVE NOW LOST, EVEN IF I DON'T GRANT THE

MISTRIAL, ABOUT AN HOUR, BY THE TIME THIS IS TAKEN CARE OF. AND THERE IS A HUGE ISSUE ON APPEAL THAT LAWYERS WILL SPEND LOTS OF TIME BRIEFING AND WILL ADD TO THE APPELLATE ISSUES THAT GO UP. AND IF THE COURT OF APPEALS FINDS THAT I ERRED IN NOT GRANTING THE MISTRIAL, IF THAT'S WHAT I DECIDE TO DO, THEN THE CASE WILL HAVE TO BE RE-TRIED.

AND SO THAT WILL HAVE COST US THE EXPENSE OF NOT ONLY BRINGING IN ANOTHER JURY AND BRINGING THE WITNESSES BACK, BUT WE HAVE TO GO THROUGH THE ORDEAL OF TESTIFYING AGAIN. BUT THERE IS A HUGE COST IN CONNECTION WITH APPEAL. AND AT THE VERY LEAST, THERE'S A HUGE APPELLATE ISSUE.

I WANT TO MAKE SURE YOU UNDERSTAND HOW SIGNIFICANT THIS IS, WHETHER I GRANT THE APPEAL -- OR EXCUSE ME, THE MISTRIAL OR NOT.

DO YOU UNDERSTAND THAT, OFFICERS?

OFFICER TWITCHELL: YES, MA'AM.

OFFICER GALLOWAY: YES.

THE COURT: THIS ISN'T HUMOROUS.

OFFICER TWITCHELL: IT WAS NOT INTENDED TO IN ANY WAY AFFECT THOSE PEOPLE.

THE COURT: IF YOU WERE BAD OFFICERS, I WOULDN'T EVEN BOTHER TALKING ABOUT IT WITH YOU. BUT YOU'RE NOT; YOU'RE BOTH VERY FINE OFFICERS. THAT'S

WHY I AM TAKING THE TIME TO DISCUSS IT WITH YOU, BECAUSE I WANT YOU TO BE EVEN BETTER OFFICERS.

IT'S A BIG DEAL, WHATEVER IS SAID AT THE GATES, BECAUSE PEOPLE PAY ATTENTION TO IT. PEOPLE IN UNIFORM. AND IN FACT, THE MORE PROFESSIONAL YOU ARE, THE MORE IT TENDS TO BE OBSERVED. YOU BOTH APPEAR TO BE, IN MY EXPERIENCE, VERY FINE OFFICERS.

SO I'M TAKING THE TIME TO TELL YOU THIS CANNOT EVER OCCUR AGAIN. AND YOU NEED TO TELL YOUR COLLEAGUES, THAT WHAT THEY SAY, EVEN IN A LIGHTHEARTED, JOKING MANNER, IS NOT INSIGNIFICANT.

OBVIOUSLY THE PUBLIC IS GOING TO PAY ATTENTION TO IT, AND IT'S GOING TO GET BACK TO ME. I DON'T WANT TO DECLARE A MISTRIAL, BUT I ALSO KNOW AT THIS POINT IT'S GOING TO BE AN ISSUE IF I DON'T. SO I NEED TO THINK ABOUT IT. AND TWO THINGS I NEED TO DO IS, I NEED TO QUICKLY DEAL WITH THIS ISSUE AND TRY TO DO IT IN A WAY THAT CREATES FEWER ISSUES ON APPEAL. ASSUMING THERE IS A CONVICTION.

OBVIOUSLY, IT COULD ALSO THE IMPACT THE JURY NEGATIVE TO THE PROSECUTION, WHERE THEY THINK, GEE, THERE'S AN ISSUE AND MAYBE WE OUGHT TO BEND OVER BACKWARDS TO MAKE SURE WE GIVE HIM THE BENEFITS OF THE DOUBT. SO I JUST WANT YOU TO BE CLEAR THAT I'M NOT SAYING YOU ARE BAD OFFICERS. TO THE

CONTRARY, I HAVE A LOT OF RESPECT FOR BOTH OF YOU.

I KNOW HOW HARD YOUR JOB IS. I KNOW YOU HAVE TIME ON YOUR HANDS WHEN YOU'RE NOT WORKING REALLY HARD, AND OTHER TIMES WHEN YOU'RE REALLY UNDER THE GUN, WORKING VERY HARD AND DEALING WITH DIFFICULT AND COMPLEX ISSUES.

PLEASE DON'T DO THIS AGAIN. DO I HAVE YOUR WORD ON THIS?

OFFICER TWITCHELL: YES, AND MY SINCERE APOLOGIES TO THE COURT.

THE COURT: ENOUGH SAID. BUT PLEASE PASS THE WORD THAT JUDGE LEWIS WAS NOT UNKIND ABOUT IT. BUT THIS IS A VERY BIG DEAL. OKAY. THANK YOU, GENTLEMAN.

OFFICER TWITCHELL: THANK YOU, YOUR HONOR.

OFFICER GALLOWAY: THANK YOU, MA'AM.

THE COURT: I'M TAKING FIVE MINUTES TO THINK ABOUT IT.

(COURT IN RECESS BRIEFLY AT 2:35 P.M.)

(COURT RESUMES SESSION AT 2:40 P.M. OUT OF THE PRESENCE OF THE JURY.)

THE COURT: OFFICER, CAN I ASK YOU TO JUST TAKE THEM OUT IN THE HALL FOR ONE MOMENT. JUST ONE SECOND. WE'LL BRING THE DEFENDANT IN, AND MAKE SURE WE HAVE GOT OFFICER TIMMERMAN IN, AND THEN WE'LL

START.

(DEFENDANT NOW PRESENT.)

MR. HALE, I'M GOING TO DENY THE MOTION. I WANT TO TELL YOU AHEAD OF TIME. EXCUSE ME. I HAVE A PIECE OF CANDY IN MY MOUTH. VERY UNPROFESSIONAL. BUT I WANTED TO TELL YOU AHEAD OF TIME, I DON'T THINK IN ANY WAY IT'S GOING TO INTERFERE WITH YOUR RIGHT TO A FAIR TRIAL.

AND I THOUGHT ABOUT IT AND CONSIDERED IT, AND IF I THOUGHT IT WOULD HAVE ANY IMPACT, I WOULD HAVE GRANTED THE MOTION. BUT I DON'T THINK IT WILL. AND THIS MAY BE AN ISSUE ON APPEAL IF YOU'RE CONVICTED. AND YOU MAY NOT BE CONVICTED.

SO I HAVE CONSIDERED IT. I JUST FEEL, GIVEN THE RESPONSE OF THE ONE JUROR, THAT IT'S NOT HAD AN IMPACT. BUT I WANTED YOU TO KNOW AHEAD OF TIME.

ALL RIGHT. LET'S BRING IN THE JURY.

(PROCEEDINGS CONTINUE IN PRESENCE OF JURY.)

THE COURT: ALL RIGHT. THANK YOU.

LADIES AND GENTLEMEN, COUNSEL AND THE COURT HAVE BEEN TALKING ABOUT A VARIETY OF ISSUES WE NEED TO DEAL WITH. ISSUES LIKE JURY INSTRUCTIONS AND OTHER THINGS. WE TRY TO COORDINATE WITNESSES SO THAT WE CAN GET THEM ON WHEN THEY ARE ABLE TO

APPEAR, AND WE'VE DEALT WITH ALL OF THAT. SO EXCUSE US, BUT I THINK THE TIME HAS BEEN WELL USED.

SO THANK YOU FOR YOUR PATIENCE.

LET ME JUST ASK: DID ANYONE DISCUSS THE CASE WHILE YOU WERE OUT OF THE COURTROOM, OR FORM ON OPINION? NO HANDS ARE RAISED.

ALL RIGHT, COUNSEL. LET'S PROCEED AND CALL YOUR FIRST WITNESS.

THE COURT: STATE WILL CALL MITCHELL LEWIS.

THE COURT: WOULD YOU LIKE LIKE A GLASS OF WATER? OKAY.

MITCHELL LEWIS

CALLED BY THE PLAINTIFF, BEING DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE CASE NOW BEFORE THE COURT WILL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

DIRECT EXAMINATION

BY MR. PARKER:

Q. IF YOU'D SPEAK RIGHT INTO THE MICROPHONE AND ADJUST THAT SO IT'S RIGHT IN FRONT OF YOU.

Addendum B

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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THE STATE OF UTAH,	)	
	)	ORIGINAL
PLAINTIFF,	)	
	)	
VS.	)	CASE NO. 991906795 FS
	)	
JACOB ROSS HALE,	)	
	)	
DEFENDANT.	)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
(MOTION HEARING)

BEFORE THE HONORABLE LESLIE A. LEWIS

SALT LAKE CITY, UTAH

AUGUST 19, 1999

REPORTED BY GAYLE B. CAMPBELL, RPR, CSR

A P P E A R A N C E S

FOR THE PLAINTIFF:

PAUL PARKER
DEPUTY S. L. DISTRICT ATTORNEY
231 EAST 4TH SOUTH.
SALT LAKE CITY, UTAH 84111

FOR THE DEFENDANT:

LISA REMAL
SALT LAKE LEGAL DEFENDERS ASSOCIATION
424 EAST 5TH SOUTH
SALT LAKE CITY, UTAH 84111

I N D E X

AUGUST 20, 1999 SALT LAKE CITY, UTAH

P R O C E E D I N G S

(COMMENCING AT 4:00 O'CLOCK P.M.)

THE COURT: OKAY. WE ARE HERE IN THE MATTER OF STATE OF UTAH VERSUS JASON ROSS HALE. WE'RE HERE IN CONNECTION WITH A HEARING PRELIMINARY TO THE TRIAL ON MONDAY. AND MY UNDERSTANDING IS THIS HAS TO DO WITH ESTABLISHING SOME FOUNDATIONAL BASIS FOR EYE-WITNESS MATERIAL, AND A DETERMINATION BY THE COURT AS TO WHETHER THAT'S TO BE INCLUDED OR EXCLUDED.

MR. PARKER: THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT. YOU MAY PROCEED. THE DEFENDANT IS PRESENT WITH COUNSEL.

MS. REMAL: I HAVE PROVIDED MR. HALE WITH SOME WRITING MATERIALS, AND WOULD ASK THAT HE HAVE ONE HAND UNCUFFED.

THE COURT: YES. THE RIGHT HAND NEEDS TO BE FREE.

MS. REMAL: THANK YOU.

THE COURT: WHO ARE YOUR WITNESSES, MR. PARKER?

MR. PARKER: STATE HAS ONLY ONE WITNESS. HE IS MR. MITCH LEWIS.

THE COURT: MR. LEWIS, IF YOU WOULD COME FORWARD, SIR, AND WE'LL SWEAR YOU IN.

MITCHELL LEWIS

CALLED BY THE PLAINTIFF, BEING DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE CASE NOW BEFORE THE COURT WILL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

DIRECT EXAMINATION

Q. MR. LEWIS, THE MIC DOES AMPLIFY, SO IF YOU WILL ADJUST YOURSELF SO YOU ARE RIGHT IN FRONT IT, AND SPEAK UP SO EVERYONE CAN HEAR YOU.

STATE YOUR FULL NAME, PLEASE.

A. MITCHELL REGIS LEWIS.

Q. WOULD YOU SPELL YOUR LAST NAME?

A. L. E. W. I. S.

Q. NOW, ARE YOU A RESIDENT OF SALT LAKE COUNTY?

A. YES, I AM.

Q. NOW LET ME CALL YOUR ATTENTION TO SOME EVENTS THAT OCCURRED ON MARCH 19, OF THIS YEAR,

1999. DO YOU REMEMBER THOSE EVENTS?

A. YES, I DO.

Q. ABOUT WHAT TIME DID THEY START?

A. APPROXIMATELY 11:45.

Q. IS THAT A.M. OR P.M.

A. IT'S A.M.

Q. NOW, LET ME ASK SOME QUESTIONS ABOUT SOME THINGS THAT OCCURRED JUST BEFORE THAT. FOR INSTANCE, THE NIGHT BEFORE. HAD YOU SLEPT?

A. YES.

Q. ABOUT HOW MANY HOURS?

A. I'D HAD AT LEAST EIGHT.

Q. NOW, DID YOU GET UP IN THE MORNING AT YOUR YOUR USUAL CIRCUMSTANCE IS?

A. NO. I HAD A VACATION DAY THAT DAY, SO I DID SLEEP IN A LITTLE BIT MORE.

Q. ABOUT WHAT TIME DID YOU GET UP?

A. OH, I DON'T REMEMBER EXACTLY. I IMAGINE IT WAS ABOUT 8:00 O'CLOCK, OR SO.

Q. NOW, HAD YOU CONSUMED ANY ALCOHOL OR DRUGS EITHER THE DAY BEFORE OR THAT DAY?

A. NO.

Q. IN FACT, DO YOU TAKE ANY PRESCRIPTION DRUGS?

A. YES, I DO.

Q. DID YOU TAKE THOSE DRUGS EITHER THE DAY BEFORE OR THAT DAY?

A. YES. THERE'S A COUPLE THAT I TAKE EVERY DAY.

Q. WHAT DRUGS ARE THOSE?

A. ONE IS ZOLOFT AND THE OTHER ONE IS PROPANALOL.

Q. WHAT DO THOSE DRUGS DO?

A. THE ZOLOFT IS AN ANTIDEPRESSANT, AND THE. PROPRANALOL IS A MIGRAINE PREVENTION MEDICATION.

Q. DO EITHER OF THOSE INTERFERE AT ALL WITH YOUR ABILITY TO THINK AND TO SEE AND TO TALK?

A. NO. NOT AT ALL.

Q. DO THEY HELP YOU ACTUALLY? ARE THINGS A LITTLE CLEARER OR A LITTLE MORE PERCEPTIBLE WHEN YOU HAVE THOSE DRUGS?

A. YES.

Q. I NOTICE YOU'RE WEARING GLASSES TODAY.

A. YES.

Q. DID YOU ALSO WEAR GLASSES BACK ON MARCH 19?

A. YES, I DID.

Q. AND WHEN THIS EVENTS OCCURRED WERE YOU WEARING THOSE GLASSES?

A. YES.

Q. AND CAN YOU SEE CLEARLY WHEN YOU HAVE YOUR

GLASSES ON?

A. YES. VERY CLEARLY.

Q. FOR INSTANCE, IF YOU LOOK AROUND THIS COURTROOM, ARE THINGS IN FOCUS IN THIS COURTROOM?

A. YES, VERY MUCH.

Q. BOTH THOSE THINGS UP CLOSE, AS WELL AS FAR AWAY?

A. YES.

Q. NOW, DID THERE COME A TIME AT ALL DURING ANY OF THIS EVENT THAT YOUR GLASSES WERE REMOVED AT ALL?

A. NOT FOR A VERY LONG PERIOD OF TIME. I DON'T REMEMBER HAVING THEM OFF FOR, YOU KNOW, A GREAT LENGTH OF TIME. I MAY HAVE TAKEN THEM OFF TO RUB MY EYES, OR WHATEVER, BUT I WOULD HAVE PUT THEM RIGHT BACK ON.

Q. LET'S TALK ABOUT THE EVENT ITSELF AND SOME OF THE CIRCUMSTANCES. YOU INDICATED IT OCCURRED IN THE MORNING. WAS IT LIGHT OR DARK?

A. IT WAS BROAD DAYLIGHT.

Q. WAS THE WEATHER-- WHAT WAS THE WEATHER LIKE? DO YOU RECALL GENERALLY?

A. THE WEATHER, IT WAS A BEAUTIFUL SPRING DAY. CLEAR SKIES AND SHORT SLEEVE WEATHER FOR MARCH DAYS.

Q. DID YOU HAVE ANY DIFFICULTY SEEING ANYTHING

DURING THAT DAY?

A. NO.

Q. DID YOU HAVE ANY PROBLEMS WITH YOUR HEARING OR ANY OTHER PARTS OF YOUR BODY ON THAT DAY?

A. NO.

Q. NOW, LET ME CALL YOUR ATTENTION TO WHEN THIS EVENT STARTED. WHERE WERE YOU JUST PRIOR TO IT STARTING?

A. SITTING IN MY VEHICLE IN SUGARHOUSE PARK.

Q. WHY WERE YOU THERE?

A. I WENT TO ENJOY LUNCH AND READ A NEWSPAPER.

Q. WHERE WERE YOU WITH ANYONE OR WERE YOU BY YOURSELF?

A. I WAS BY MYSELF.

Q. WAS THERE ANYTHING THAT, PRIOR TO THE EVENT STARTING, THAT WAS -- THAT HAD EITHER TROUBLED YOU OR THAT YOU WERE ANXIOUS ABOUT?

A. ONLY MINUTES BEFORE THE EVENT STARTED IS WHEN I NOTICED SOMETHING IN MY REAR VIEW MIRROR, AND THAT WAS THE FIRST I WAS AWARE OF ANYTHING THAT WOULD-- ANYTHING UNUSUAL.

Q. LET'S GO TO THAT EVENTS. WHAT WAS THE FIRST UNUSUAL THING THAT CALLED YOUR ATTENTION TO THIS EVENTS?

A. I GUESS IT'S NOT UNUSUAL TO SEE PEOPLE IN

YOUR REAR VIEW MIRROR, BUT THAT'S ACTUALLY HOW IT BEGAN. I GLANCED UP FROM MY PAPER, LOOKED INTO THE MIRROR AND I DID SEE TWO INDIVIDUALS SOME DISTANCE BEHIND MY CAR, APPROACHING MY VEHICLE.

Q. AND COULD YOU SEE THEIR FACES, AS WELL AS THEIR FULL BODIES AT THAT TIME THAT YOU GLANCED IN THE MIRROR?

A. I DON'T REMEMBER AT THAT POINT IF-- IF HOW MUCH OF THEIR BODIES WERE VISIBLE, BUT THERE WERE DEFINITELY TWO PEOPLE.

Q. HOW LONG DID YOU LOOK AT THEM THAT FIRST GLANCE?

A. PROBABLY JUST SECONDS, VERY SHORTLY. AND I WENT BACK TO READING.

Q. AND WHAT WAS THE NEXT THING THAT YOU NOTICED?

A. THE NEXT THING I WAS AWARE OF IS THAT THEY PASSED MY VEHICLE ON THE PASSENGER SIDE.

Q. DID YOU LOOK AT THEM AS THEY PASSED?

A. I DID.

Q. HOW CLOSE TO YOUR CAR AND TO WHERE YOU WERE SEATED WERE WE THEY AS THEY PASSED?

A. THEY WERE VERY CLOSE. I WOULD SAY WITHIN SEVERAL FEET OF MY CAR.

Q. HOW LONG DID YOU LOOK AT THEM THAT TIME?

A. AGAIN, THAT WAS A PRETTY SHORT GLANCE. I DIDN'T SEE FACES AT THAT POINT BECAUSE THEY WERE CLOSE ENOUGH TO THE CAR, AS I LOOKED OUT THE WINDOW, YOU KNOW, THE TOP OF THE WINDOW PREVENTED ME FROM SEEING THEIR UPPER BODIES. BUT I DID SEE THEM IN PASSING THE CAR.

Q. WHAT WAS THE NEXT THING THAT CALLED YOUR ATTENTION TO THOSE TWO PEOPLE?

A. AGAIN, I WENT BACK TO READING, AND I LOOKED UP AND SAW THE TWO INDIVIDUALS IN FRONT OF MY CAR, MAYBE 100 FEET OR SO, AND THEY'D TURNED AROUND AND WERE HEADING BACK TOWARDS MY CAR.

Q. AND WERE THEY FACING YOU AT THAT TIME?

A. YES.

Q. COULD YOU SEE THEIR FACES?

A. YES.

Q. AND HOW LONG DID YOU LOOK AT THEM ON THAT OCCASION?

A. AGAIN, IT PROBABLY WASN'T TOO LONG. I-- I DIDN'T REALLY-- I WASN'T REALLY FRIGHTENED AT THAT POINT. I JUST -- YOU KNOW, IT WAS A PUBLIC PARK, THERE'S PEOPLE WALKING BY ALL THE TIME. IT JUST DIDN'T-- YOU KNOW JUST DIDN'T CAUSE ME GREAT CONCERN AT THAT POINT. I WENT BACK TO READING MY NEWSPAPER.

Q. WHEN NEXT DID YOU SEE THEM?

A. THE NEXT TIME THEY WERE RIGHT AT THE DRIVER'S SIDE WINDOW.

Q. AND HOW FAR AWAY FROM YOU YOURSELF?

A. NOT FAR. THEY WERE VERY VERY CLOSE.

Q. WITHIN FEET, WITHIN INCHES, HOW FAR?

A. THEY WERE STANDING RIGHT NEXT TO THE CAR.

Q. AND COULD YOU SEE THEIR FACES AT THAT TIME?

A. YES.

Q. AND DID EITHER ONE OF THESE INDIVIDUALS HAVE ANYTHING THAT COVERED THEIR FACE, ANY HATS, GLASSES, MASKS, ANYTHING LIKE THAT?

A. ONE OF THE INDIVIDUALS WAS WEARING SUN GLASSES.

Q. AND DID EITHER ONE HAVE A HAT ON AT ALL?

A. NOT THAT I RECALL.

Q. DID EITHER ONE HAVE ANY OTHER KIND OF MASK OR COVERING?

A. NO.

Q. AND WHAT HAPPENED AS THOSE TWO PEOPLE STOOD AT YOUR DOOR?

A. ONE INDIVIDUAL SAID TO ME-- MY WINDOW WAS ABOUT FOUR OR FIVE INCHES DOWN, AND, YOU KNOW, HE KIND OF LEANED OVER TO SPEAK THROUGH THE OPEN PART OF THE WINDOW, AND SAID, "DO YOU KNOW WHERE PLAY IT

AGAIN SPORTS IS?"

Q. AND WHICH OF THE TWO, THE ONE WITH SUNGLASS OR THE ONE WITHOUT, WAS THE ONE THAT SPOKE TO YOU?

A. IT WAS THE DARK-HAIRED DEFENDANT, THE ONE WITH THE SUNGLASSES.

Q. ALL RIGHT. AND AFTER HE ASKED YOU THAT, WHAT DID YOU SAY OR DO?

A. I SAID I DID NOT KNOW WHERE THAT PLACE WAS, THAT I DIDN'T THINK IT WAS IN THAT AREA.

Q. THEN WHAT HAPPENED?

A. AND MAYBE I SHOULD SAY, TOO, WE WERE TALKING ABOUT THE SUNGLASSES AT THAT POINT. I DON'T KNOW IF WHEN HE WAS RIGHT AT MY WINDOW THAT HE HAD THE SUNGLASSES ON, BUT HE WAS WEARING THEM DURING THE INCIDENT.

Q. SO HE MAY OR MAY NOT HAVE HAD THEM ON--

A. AT THAT PARTICULAR MOMENT, YES.

Q. OKAY. SO AFTER YOU TALKED ABOUT PLAY IT AGAIN SPORTS, THEN WHAT HAPPENED?

A. AT THAT POINT AFTER I SAID I DIDN'T KNOW WHERE IT WAS, HE LIFTED A SHIRT THAT HE HAD -- I THOUGHT IT WAS A SHIRT-- SOME SORT OF MATERIAL THAT HE HAD DRAPED OVER HIS ARM, AND SHOWED ME A GUN AND SAID, "WELL, YOU'RE GOING TO TAKE US THERE ANYWAY."

Q. AS SOON AS THAT PERSON SAID THAT, THE ONE

WITH THE DARK GLASSES, DID THE TWO PEOPLE AT THE SIDE OF YOUR DOOR MOVE AT ALL?

A. I THINK THERE WERE A FEW MOMENTS THEY STAYED THERE. AND HE, THE DARK-HAIRED ONE AGAIN, IMMEDIATELY STARTED SAYING, "UNLOCK YOUR DOOR. UNLOCK YOUR DOOR."

Q. AND DID YOU UNLOCK THE DOOR?

A. YES. AS A MATTER OF FACT, I DID.

Q. AND WHAT DID THE TWO PEOPLE DO?

A. AT THAT POINT THE RED-HAIRED DEFENDANT WENT TO THE PASSENGER SIDE OF MY CAR, OPENED THE DOOR. AND DIDN'T ACTUALLY GET IN THE CAR, BUT POKED HIS HAND IN AND STARTED RUMMAGING THROUGH THE THINGS THAT I HAD IN THE FRONT SEAT OF THE CAR.

Q. WHAT DID THE ONE WITH THE DARK GLASSES DO?

A. HE REMAINED AT THE DRIVER'S SIDE WINDOW WITH A GUN HELD TO ME.

Q. HOW LONG DID HE STAY THERE?

A. IT WAS MINUTES. BEFORE HE TOLD ME TO GET OUT OF THE CAR, AND HE-- AND GET IN THE BACK SEAT.

Q. AS YOU GOT OUT OF THE CAR, DID YOU GET OUT THE DRIVER'S DOOR?

A. YES.

Q. AND WAS THE PERSON WITH THE DARK GLASSES STILL THERE BY THE DRIVER'S DOOR?

A. YES.

Q. WERE YOU ABLE TO STAND UP NEXT TO THAT PERSON WITH DARK GLASSES?

A. YES.

Q. WERE YOU ABLE TO COMPARE YOUR HEIGHT WITH HIS HEIGHT?

A. YES.

Q. AND WERE YOU ABLE TO LOOK AT HIS FEATURES FURTHER AS YOU STOOD UP?

A. YES.

Q. AFTER YOU STOOD UP, DID THAT PERSON HAVE YOU GO SOMEWHERE IN THE CAR OR AROUND THE CAR?

A. NOT AROUND THE CAR. I JUST STEPPED OUT OF THE VEHICLE, AND HE ASKED ME FOR THE KEY TO THE CAR. I GAVE HIM THE KEY, AND THEN HE TOLD ME TO GET IN THE BACK SEAT.

Q. OKAY, SO THIS PERSON WITH THE DARK GLASSES TOLD YOU TO GET IN THE BACK SEAT?

A. YES.

Q. WHERE DID THE PERSON WITH DARK GLASSES GO?

A. AT SOME POINT HE HANDED THE KEYS OFF, I BELIEVE, TO THE OTHER PERSON. AND THE OTHER PERSON GOT IN THE DRIVER'S SEAT. AND THEN I ENTERED THE BACK SEAT THROUGH THE REAR DOOR ON THE DRIVER'S SIDE AND SLID OVER, THE DARK-HAIRED DEFENDANT WITH THE

GUN GOT INTO THE CAR BESIDE ME.

Q. SO HE WAS IN THE BACK SEAT WITH YOU?

A. YES.

Q. AND DID YOU END UP BEING DRIVEN AROUND IN THAT CAR FOR SOME TIME?

A. YES.

Q. ABOUT HOW LONG WERE YOU DRIVEN AROUND IN THAT CAR?

A. YOU MEAN THE WHOLE THE DURATION OF THE ENTIRE EVENT OR --

Q. TO HELP YOU OUT, UNTIL YOU GOT TO THE PLACE THAT YOU WERE ASKED TO GET OUT, HOW LONG WERE YOU IN THAT CAR?

A. I WOULD GUESS AT LEAST AN HOUR.

Q. AND DURING THAT TIME WAS THIS PERSON WITH THE DARK GLASSES ALWAYS IN THE BACK SEAT BY YOU?

A. YES.

Q. AND ABOUT HOW FAR AWAY WERE YOU AS YOU SAT, BOTH OF YOU, IN THE BACK SEAT?

A. WE WERE PROBABLY ONLY FOUR OR FIVE INCHES APART.

Q. DURING THAT TIME DID THIS PERSON WITH THE GLASSES KEEP THE DARK GLASSES ON ALL THE TIME?

A. YES. I THINK IN THE VEHICLE HE DID HAVE THE GLASSES ON.

Q. COULD YOU SEE, NEVERTHELESS, AT TIMES HIS EYES?

A. YES, I COULD.

Q. HOW COULD YOU DO THAT?

A. IF YOU'RE LOOKING AT SOMEONE FROM THE SIDE, IT'S EASY TO SEE UNDERNEATH THE GLASSES. AND I COULD SEE HIS EYES, HIS EYELASHES, AND EYEBROWS. THERE WAS-- HIS FACE WAS VISIBLE TO ME THROUGH THE GLASSES FROM THAT ANGLE.

Q. DID YOU NOTICE ANYTHING UNUSUAL ABOUT HIS EYES?

A. YES. I THOUGHT EITHER HE WAS TIRED OR MAYBE -- I DIDN'T KNOW IF HE WAS-- HAD BEEN DRINKING, OR WHATEVER. FOR WHATEVER REASON HE JUST HAD A VERY -- WHAT SEEMED TO ME TO BE KIND OF A SLOW WAY OF BLINKING, AND THAT WAS ONE THING THAT JUST STOOD OUT, THAT I REMEMBERED.

Q. AND DURING THIS HOUR DID YOU ALSO HAVE CONVERSATIONS WITH THIS PERSON IN THE DARK GLASSES?

A. YES.

Q. NOW, DID THEY EVENTUALLY TAKE YOU SOMEWHERE WHERE YOU WERE ASKED TO GET OUT OF THE CAR?

A. YES.

Q. WHERE WAS THAT?

A. ABOUT FIVE MILES UP BIG COTTONWOOD CANYON.

Q. AND WHEN YOU WERE ASKED TO GET OUT OF THE CAR, WHAT DID THE PERSON WITH THE DARK GLASSES DO?

A. HE FOLLOWED ME, AND WE STARTED DOWN THE SIDE OF THE -- OF A RAVINE OFF TO THE SIDE OF WHERE THE CAR WAS PARKED.

Q. WHEN YOU WENT DOWN TO THE RAVINE, HOW FAR WAS THIS PERSON AWAY FROM YOU WITH DARK GLASSES?

A. AGAIN, HE WAS BEHIND ME, BUT I KNEW HE WAS COMING BEHIND ME. I HEARD HIM FOLLOWING ME.

Q. WHAT DID YOU DO WHEN YOU WENT DOWN TO THE BOTTOM OF THE RAVINE?

A. IT WASN'T ACTUALLY TO THE BOTTOM, BUT IT WAS-- I'M NOT SURE, TEN OR TWENTY FEET, MAYBE, DOWN. AND HE JUST SAID, "KEEP GOING, KEEP GOING," UNTIL HE SAID STOP. AND THEN I SAT ON A ROCK THERE, AND HE STOOD BESIDE ME, KIND OF LEANING UP AGAINST ANOTHER ROCK. AND THAT WAS BASICALLY WHERE WE STAYED.

Q. WHERE DID THE OTHER GUY GO?

A. HE REMAINED UP BY THE CAR, AND DROVE OFF AT SOME POINT.

Q. AS THE OTHER PERSON DROVE OFF, DID THE GUY WITH THE DARK GLASSES STAY WITH YOU THERE IN THE RAVINE?

A. YES, HE DID.

Q. DID YOU HAVE A CHANCE TO TALK FURTHER WITH THE PERSON IN THE DARK GLASSES?

A. YES, WE DID.

Q. DID YOU HAVE A CHANCE TO OBSERVE HIS FEATURES?

A. YES.

Q. AND WHAT WAS THE LIGHTING LIKE UP IN THE CANYON?

A. AGAIN, IT WAS-- YOU KNOW, IT WAS DAYLIGHT. WE WERE IN THE SHADE, HOWEVER. BUT THERE WAS, YOU KNOW, PATCHES OF SHADE ALL OVER, WITH ALL THE TREES. BUT THERE WAS AMPLE SUNLIGHT, AS WELL IN OTHER PARTS OF THAT RAVINE.

Q. ABOUT HOW FAR AWAY FROM YOU WAS HE MOST OF THE TIME?

A. WE WERE VERY CLOSE. I WOULD SAY OUR FACES MAYBE WERE SIX FEET APART.

Q. HOW LONG DID YOU STAY UP IN THAT RAVINE WITH THAT PERSON IN THE DARK GLASSES?

A. AGAIN, I WAS NOT WEARING A WATCH THAT DAY, SO I'M ESTIMATING, BUT AT LEAST AN HOUR.

Q. NOW, I'M GOING TO SKIP AHEAD IN THE CHRONOLOGY. AFTER THESE EVENTS OCCURRED, WAS THERE A TIME THAT YOU MET WITH THE POLICE OFFICERS INVESTIGATING THIS CASE AND WERE ASKED TO LOOK AT

SOME PHOTOGRAPHS?

A. YES.

Q. AND HOW LONG AFTER MARCH THE 19TH, AFTER THIS EVENT, WERE YOU ASKED TO LOOK AT THESE PHOTOGRAPHS?

A. I BELIEVE THE DATE WAS MONDAY, MARCH 29TH.

Q. AND WHERE WERE YOU WHEN YOU LOOKED AT THESE PHOTOGRAPHS?

A. DOWNTOWN AT DETECTIVE TIMMERMAN'S OFFICE.

Q. HOW WERE YOU FEELING? WERE YOU ILL, OR SUFFERING FROM ANYTHING AT THE TIME YOU LOOKED AT THOSE PHOTOGRAPHS?

A. NO.

Q. AND DID YOU STILL HAVE YOUR GLASSES ON?

A. YES.

Q. AND DID YOU HAVE ANY DRUGS OR ALCOHOL OR OTHER THINGS THAT WE HAVE TALKED ABOUT DURING THE TIME YOU LOOKED AT THOSE PHOTOGRAPHS?

A. NO. I HAD GOTTEN THE CALL WHEN I WAS AT WORK, ACTUALLY. AND I ACTUALLY LEFT THE OFFICE TO GO DOWN THERE.

Q. HAD YOU HAD SLEPT THE NIGHT BEFORE AND HAD SUFFICIENT SLEEP?

A. YES.

Q. AND WHAT DID DETECTIVE TIMMERMAN TELL YOU

BEFORE HE SHOWED YOU ANY PHOTOGRAPHS?

A. WHEN I TALKED TO HIM ON THE PHONE, HE SAID, "WE HAVE A COUPLE GOOD SUSPECTS IN YOUR CASE. COULD YOU COME DOWN AND LOOK AT SOME PICTURES."

Q. DID HE GIVE YOU SOME PICTURES?

A. YES, HE DID.

Q. AND HOW PHYSICALLY DID HE GIVE YOU THOSE PICTURES?

A. I DON'T REMEMBER WHETHER I ACTUALLY TOOK THEM FROM HIS HANDS, OR HE MAY HAVE PLACED THEM ON A TABLE. BUT IT SEEMS TO ME THEY EXPLAINED THERE'D BE SIX PHOTOS IN EACH SET, AND THEN I WAS FREE TO, YOU KNOW, TAKE ONE OFF THE TOP OF THE OTHER AND SPREAD THEM OUT ON THE TABLE.

Q. THESE PHOTOGRAPHS, WAS THERE ANY WRITING ON THE PHOTOGRAPHS THAT YOU SAW ON ANY OF THEM?

A. NO.

Q. WERE THEY IN COLOR, BLACK AND WHITE, OR A MIXTURE?

A. COLOR.

Q. AND DID THEY ALL PORTRAY INDIVIDUALS OF THE SAME RACE AND GENERAL COLORING AS THE PERSON WITH IT DARK GLASSES?

A. YES, AS FAR AS I CAN RECALL.

Q. DID THEY ALSO PORTRAY PEOPLE OF THE SAME

AGE AND GENERAL BUILD AS THE PERSON WITH THE DARK GLASSES?

A. IT LOOKED LIKE IT TO ME. OF COURSE I COULD ONLY SEE FROM THE SHOULDERS UP. YOU COULDN'T SEE-- SEE THEIR BUILD, PER SE. BUT, YES, THEY ALL LOOKED RELATIVELY THE SAME AGE AND--

Q. BETWEEN THE TIME TIME OF THIS EVENT OF MARCH 19 UNTIL WHEN YOU LOOKED AT THESE PHOTOGRAPHS, HAD YOU HEARD NEW NEWS STORIES OR SEEN ANY PRINTED MATERIALS ON THE CRIME THAT HAD OCCURRED?

A. BEFORE-- I DID HE SEE AN ARTICLE IN THE PAPER. I DIDN'T KNOW IT WAS IN THERE, BUT IT WAS, I THINK, JUST A COUPLE PARAGRAPHS ON THE THE BACK PAGE. AND I CAN'T REMEMBER AT WHAT POINT I WAS MADE AWARE OF THAT ARTICLE. SOMEONE ELSE SAID TO ME THAT THEY HAD SEEN SOMETHING LIKE THAT IN THE PAPER. SIMILAR TO WHAT HAD HAPPENED TO ME.

Q. DID IT SHOW ANY PHOTOGRAPHS?

A. NO.

Q. OF ANY PARTICULAR SUSPECTS?

A. NO.

Q. NOW, AS YOU LOOKED THROUGH THOSE PHOTOGRAPHS DETECTIVE TIMMERMAN GAVE YOU, WERE YOU ABLE TO PICK OUT AN INDIVIDUAL?

A. YES.

Q. AND DO YOU SEE THE INDIVIDUAL IN THE COURTROOM TODAY THAT YOU PICKED OUT OF THAT PHOTOGRAPHIC LINE UP?

A. YES, I DO SEE THAT INDIVIDUAL.

Q. WOULD YOU PHYSICALLY POINT TO THAT PERSON TODAY AND DESCRIBE WHAT HE'S WEARING TODAY?

A. YES. SITTING RIGHT HERE IN FRONT OF ME IN THE YELLOW JUMPSUIT.

MR. PARKER: MAY THE RECORD SHOW HE'S IDENTIFIED THE DEFENDANT.

THE COURT: THE DEFENDANT HAS BEEN IDENTIFIED.

Q. (BY MR. PARKER) NOW I'LL ASK YOU, ALSO AFTER THAT HE PHOTO LINEUP, DID YOU HAVE SOME OTHER OPPORTUNITY TO ACTUALLY SEE VARIOUS PEOPLE IN AN ACTUAL LINEUP WHERE THERE WAS BODIES THAT STOOD BEFORE YOU?

A. YES, I DID.

Q. DO YOU REMEMBER THAT DATE?

A. IT WAS LATER, IN MAY. MAY 4TH, I BELIEVE IT WAS.

THE COURT: I BEG YOUR PARDON, SIR. ONE MORE TIME.

THE WITNESS: I BELIEVE IT WAS MAY 4TH, TUESDAY.

THE COURT: THANK YOU.

Q. (BY MR. PARKER) DO YOU RECALL HOW MANY PEOPLE YOU WERE SHOWN?

A. THERE WERE EIGHT.

Q. INDIVIDUALS?

A. YES.

Q. AND DO YOU RECALL WHERE THAT OCCURRED?

A. YES.

Q. WHERE DID IT OCCUR?

A. DOWNTOWN POLICE STATION ON SECOND SOUTH AND SECOND EAST.

Q. PRIOR TO LOOKING AT THOSE INDIVIDUALS, WERE YOU TOLD CERTAIN THINGS ABOUT THE LINEUP?

A. (NO RESPONSE.)

Q. LET HE HELP YOU OUT.

A. ABOUT THE INDIVIDUALS THEMSELVES?

Q. WERE YOU TOLD WHETHER OR NOT THE SUSPECTS OR THE DEFENDANTS WERE ACTUALLY IN THAT LINEUP?

A. I WAS TOLD THAT IT WAS A POSSIBILITY THAT THE SUSPECTS WOULD NOT BE BE IN THE LINEUP, ACTUALLY.

Q. AND WERE YOU ARE ABLE TO LOOK AT THESE SEVERAL INDIVIDUALS, THESE EIGHT PEOPLE AS THEY STOOD BEFORE YOU?

A. YES.

Q. WERE THEY ALSO OF THE SAME RACE?

A. YES.

Q. THE SAME GENERAL HAIR COLORING?

A. IN GENERALLY.

Q. THE SAME GENERAL AGE?

A. YES.

Q. AND THE SAME GENERAL SEX?

A. YES.

Q. WERE YOU ABLE TO PICK SOMEONE OUT OF THAT LINEUP?

A. YES, I WAS.

Q. AND DO YOU SEE THAT PERSON IN COURT TODAY THAT YOU WERE ABLE TO PICK OUT OF THAT LINEUP?

A. YES, I SEE THAT PERSON.

Q. WOULD YOU TELL THE COURT WHERE HE IS TODAY?

A. YES. HE'S SITTING IN FRONT OF ME IN THE YELLOW JUMPSUIT.

THE COURT: ALL RIGHT. THE DEFENDANT HAS BEEN IDENTIFIED AGAIN.

MR. PARKER: NO FURTHER QUESTIONS, YOUR HONOR.

THE COURT: ALL RIGHT. CROSS.

MS. REMAL: THANK YOU.

CROSS-EXAMINATION

BY MS. REMAL:

Q. MR. LEWIS, THIS WAS A VERY FRIGHTENING EVENT TO YOU; CORRECT?

A. YES. YES, MA'AM.

Q. IN FACT, THERE WERE SOME TIMES DURING THE EVENT ITSELF THAT YOU WERE CONCERNED THAT YOU WEREN'T GOING TO MAKE IT OUT OF IT ALIVE?

A. ABSOLUTELY.

Q. AND YOU MET WITH THE POLICE OFFICERS, FAIRLY SHORTLY AFTER THE EVENT ENDED THAT SAME DAY?

A. YES.

Q. ONE OF THE THINGS THAT THE OFFICER ASKED YOU IS WHETHER YOU COULD DESCRIBE THE TWO SUSPECTS TO HIM; CORRECT?

A. YES.

Q. AND YOU TOLD THAT OFFICER AT THAT POINT THAT YOU WERE SO TRAUMATIZED BY THE WHOLE THING THAT YOU WEREN'T SURE THAT YOU'D BE ABLE TO IDENTIFY THESE TWO MEN; IS THAT CORRECT?

A. YES.

Q. DURING THE TIME THAT YOU WERE RIDING AROUND IN THE BACK SEAT OF THE VEHICLE THAT YOU HAVE DESCRIBED, YOU INDICATED HAD THAT THE INDIVIDUAL WITH THE SUNGLASSES HAD A GUN. OR EARLIER; CORRECT?

A. THAT'S RIGHT.

Q. DURING THE TIME THAT YOU WERE RIDING AROUND, HE STILL HAD THAT GUN?

A. YES.

Q. AND THAT GUN WAS VISIBLE TO YOU THE ENTIRE TIME; CORRECT?

A. YES, IT WAS POINTED AT ME.

Q. IN FACT, IT WAS POINTED AT YOU JUST A FEW INCHES AWAY?

A. YES.

Q. AND FOR SOME OF THE TIME YOU'D LOOK AT THE GUN TO SEE IF IT WAS STILL POINTED AT YOU WHILE YOU WERE RIDING AROUND; CORRECT?

A. YES.

A. AFRAID ABOUT WHETHER IT WAS GOING TO BE FIRED AT YOU?

A. YES.

Q. DURING THAT TIME THAT YOU WERE IN THE BACK SEAT OF THE CAR, SOMETIMES YOU WERE LOOKING STRAIGHT AHEAD TO TRY AND FIGURE OUT WHERE YOU WERE GOING; CORRECT?

A. YES.

Q. AND SOMETIMES YOU WERE LOOKING SIDEWAYS AT THE MAN WHO WAS SETTING NEXT TO YOU?

A. YES.

Q. SOMETIMES YOU WERE LOOKING AT THE MAN WHO

WAS DRIVING THE CAR?

A. THAT'S RIGHT.

Q. AND MOST OF THE TIME WHEN YOU LOOKED AT THE MAN WHO WAS IN THE BACK SEAT WITH YOU, YOU WERE LOOKING AT THE SIDE OF HIS FACE; CORRECT?

A. THAT'S CORRECT.

Q. AND YOU'VE ALREADY SAID HE HAD THE SUNGLASSES ON THE WHOLE TIME?

A. YES, HE DID.

Q. AND THE WAY YOU COULD SEE THE HIS EYES WAS FROM LOOKING IN THE SIDE OF THE SUNGLASSES, AROUND THE EDGE?

A. YES.

Q. AND WHAT YOU DESCRIBED ABOUT HIS EYES AND IN PARTICULAR THIS SORT OF SLOW BLINKING?

A. THAT'S THE BEST WAY I CAN DESCRIBE IT.

Q. AND WHEN YOU LATER LOOKED AT INDIVIDUALS IN THE LINEUP, WHEN YOU VERY FIRST LOOKED AT THE INDIVIDUALS, DIDN'T YOU THINK THAT MAYBE THE SUSPECT WASN'T THERE AFTER ALL, AT FIRST?

A. YES. I SURE DID.

Q. EVENTUALLY, ONE OF THE THINGS YOU LOOKED AT OF THE PEOPLE IN THE LINEUP WAS THE WAY THEY WERE BLINKING; RIGHT?

A. YES.

Q. AND ONE OF THE REASONS THAT YOU DECIDED THAT MR. HALE WAS THE SUSPECT FOR TO YOU PICK, WAS THAT HE WAS BLINKING IN SORT OF A SLOW WAY?

A. YES.

Q. DURING THE TIME THAT YOU WERE TOGETHER WITH THESE INDIVIDUALS, YOU MADE IT A POINT, DID YOU NOT, TO NOT STARE AT EITHER ONE OF THEM?

A. YES.

Q. AND YOU DID THAT BECAUSE YOU WERE TRYING TO STAY ALIVE AND DIDN'T WANT TO MAKE THEM ANGRY?

A. EXACTLY.

Q. SO WHEN YOU'D LOOK ALL THEM, PARTICULARLY THE INDIVIDUAL WITH THE GUN, YOU'D MORE GLANCE AT HIM THAN LOOK AT HIM FOR VERY LONG?

A. THAT'S RIGHT.

Q. NOW, YOU HAVE INDICATED THAT YOU WERE ULTIMATELY FORCED TO GET OUT OF THE VEHICLE UP IN BIG COTTONWOOD CANYON?

A. YES.

Q. WERE FORCED TO CLIMB DOWN THE SIDE OF THE ROAD?

A. THAT'S RIGHT.

Q. AND IT SOUNDS LIKE IT'S A FAIRLY STEEP AREA WHERE -- YOU'RE GOING DOWN PRETTY STEEPLY AS YOU'RE GOING DOWN FROM THE ROAD?

A. YES. I HAD TO ACTUALLY PUT MY HANDS IN BACK OF ME TO KIND OF BRACE MYSELF SO I WOULDN'T, YOU KNOW, FALL.

Q. AND AS YOU WERE CLIMBING DOWN FROM THE ROAD DOWN INTO THE RAVINE, OR WHATEVER YOU WANT TO CALL IT, I TAKE IT THAT MOST OF THE TIME YOU WERE CONCENTRATING ON TRYING NOT TO FALL DOWN THE HILL. OR THAT'S PART OF WHAT YOU'RE DOING?

A. YES.

Q. YOU WERE LOOKING AHEAD OF YOU SO YOU COULD STEP IN PLACES, SO YOU WOULDN'T TUMBLE?

A. YES. BECAUSE IT WAS VERY ROCKY, AND THERE WAS SNOW UP THERE AT THAT TIME, TOO.

Q. SO THERE WAS THE EXTRA DANGER OF SLIDING ON THE SNOW?

A. RIGHT.

Q. NOW, DID I UNDERSTAND YOU TO SAY THIS AFTERNOON THAT WHEN YOU GOT DOWN THERE YOU WERE ABLE TO SEE THE FACE OF THE PERSON WHO HAD THE GUN?

A. YES. I LOOKED AT HIM-- SEVERAL TIMES WHILE WE WERE DOWN THERE, YES.

Q. DO YOU REMEMBER TESTIFYING ABOUT THE SAME EVENT AT OUR PRELIMINARY HEARING ON MAY 15?

A. YES.

Q. AND DO YOU RECALL TESTIFYING THAT

ESSENTIALLY THAT AS YOU STARTED CLIMBING DOWN THERE YOU DIDN'T LOOK AT THE PERSON WITH THE GUN?

A. NOT AS WE WERE CLIMBING DOWN. I CERTAINLY DID AFTER WE WERE SEATED ON THE ROCKS BEHIND THE TREES.

Q. AND YOU REMEMBER THE PERSON BEING SEATED CLOSE TO YOU THEN?

A. HE WASN'T REALLY SEATED. HE WAS JUST LEANING OVER. STANDING, LEANING UP AGAINST SOME OTHER ROCKS.

Q. HOW FAR AWAY WERE YOU AT THAT POINT?

A. AGAIN, I AM THINKING MAYBE FIVE OR SIX FEET IS ALL.

Q. HOW MANY TIMES WHILE YOU WERE DOWN IN THAT RAVINE AREA DID YOU LOOK OVER AT THE PERSON WHO HAD HAD GUN?

A. I DIDN'T KEEP COUNT. I DON'T HAVE AM ESTIMATE OF HOW MANY TIMES THAT HAPPENED. AGAIN, I WAS DOING MY BEST TO KEEP THINGS CALM AND NOT IRRITATE HIM, AND JUST HOPING THINGS WOULD TURN OUT FOR THE BEST.

Q. WERE YOU STILL BEING CAREFUL NOT TO STARE AT THE PERSON?

A. YES.

Q. BECAUSE DIDN'T WANT THEM TO BECOME ANGRY?

A. YES.

Q. DID HE STILL HAVE THE SUNGLASSES ON THAT WHOLE TIME THAT YOU WERE DOWN IN THE RAVINE AREA?

A. IT SEEMS TO ME THAT MOST OF THE TIME HE DID.

Q. DO YOU EVER SPECIFICALLY REMEMBER HIM NOT WEARING THE SUNGLASSES?

A. NO.

Q. DO YOU REMEMBER -- I THINK YOU SAID THAT NEITHER OF THE MEN WERE WEARING ANY SORT OF HAT OR MASK TYPE COVERING?

A. NO.

Q. DO YOU REMEMBER WHETHER THE PERSON WITH THE SUNGLASSES HAD ANY SORT OF FACIAL HAIR?

A. YES, HE DID.

Q. WHAT DO YOU RECALL ABOUT THAT?

A. DARK GOATEE AND MUSTACHE.

Q. DO YOU REMEMBER WHETHER THERE WERE ANY SIDEBURNS OR NOT? YOU KNOW HOW HOW SOME PEOPLE ARE HAVE SIDEBURNS CONNECTED WITH THE BEARD?

A. I DON'T RECALL SIDEBURNS.

Q. YOU INDICATED THAT YOU LOOKED AT THE PHOTOS THAT WERE SHOWN TO YOU BY DETECTIVE TIMMERMAN?

A. THAT'S CORRECT.

Q. AND THAT YOU PICKED A PHOTOGRAPH OF

MR. HALE?

A. YES.

Q. AND YOU TOLD DETECTIVE TIMMERMAN, DID YOU NOT, THAT ON SCALE OF ONE TO TEN, ONE BEING NOT SURE AT ALL AND TEN BEING ABSOLUTELY POSITIVELY SURE, THAT YOU WERE ABOUT 59 ON THAT SCALE?

A. YES.

Q. AND AFTER THE PHOTO -- AFTER YOU SELECTED MR. HALE'S PHOTOGRAPH, DETECTIVE TIMMERMAN INDICATED TO YOU IN SOME WAY THAT YOU PICKED THE SUSPECT THAT THEY HAD; IS THAT CORRECT?

A. AFTER I'D IDENTIFIED BOTH PHOTOGRAPHS, YES.

Q. AND HE INDICATED TO YOU THAT YOU'D PICKED THE TWO SUSPECTS THAT THE POLICE WERE SUSPICIOUS OF?

A. RIGHT.

Q. AND AFTER THE LINEUP, WHEN YOU PICKED MR. HALE, MR. PARKER INDICATED TO YOU IN SOME WAY --

THE COURT: LET ME GET JUST ONE CLARIFICATION, MS. REMAL. WHAT THE WITNESS JUST ALLUDED TO THERE WAS A PHOTO-SPREAD VERSUS A LINEUP; IS THAT CORRECT?

MS. REMAL: YES.

THE COURT: ALL RIGHT.

Q. (BY MS. REMAL) THEN LATER ON IN MAY WHEN YOU HAD THE LINEUP, YOU INDICATED THAT YOU PICKED

MR. HALE AT BEING ONE OF THE SUSPECTS.

A. YES.

Q. AND AFTER THE LINEUP, YOU SPOKE BRIEFLY WITH MR. PARKER ABOUT THE LINEUP; CORRECT?

A. YES.

Q. AND MR. PARKER INDICATED TO YOU THAT YOU'D PICKED THE PERSON WHO'D BEEN ACCUSED OF THE CRIME; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. DO YOU REMEMBER HOW IT WAS THAT WAS INDICATED TO YOU?

A. YES. HE HAD LEFT THE BUILDING TO WALK BACK TO HIS OFFICE, AND I BELIEVE I SAID TO HIM, SOMETHING TO THE EFFECT OF, "HOW DID I DO?" AND HE SAID, "YES, THAT'S HIM."

Q. JUST A COUPLE MORE QUESTIONS. YOU INDICATED THAT INITIALLY THESE MEN APPROACHED YOUR CAR AFTER WALKING BY A COUPLE OF TIMES?

A. YES. WELL, IT WASN'T A COUPLE. IT WAS JUST THE ONE TIME THEY PASSED.

Q. AND THEN ULTIMATELY ONE MAN, THE MAN WITH THE SUNGLASSES, STAYED BY YOUR DRIVER'S DOOR WHILE THE OTHER INDIVIDUAL -- I THINK YOU SAID THE RED-HAIRED GUY WAS HOW I IDENTIFIED HIM -- WENT AROUND TO THE PASSENGER DOOR AND OPENED THAT UP?

A. YES.

Q. WHILE THE RED-HAIRED GUY WAS RUMMAGING THROUGH THE STUFF YOU HAD ON THE PASSENGER SEAT?

A. YES.

Q. AND THAT INCLUDED YOUR WALLET?

A. THAT WAS THE FIRST THING HE TOOK, YES.

Q. DID YOU LOOK AT THE RED-HAIRED GUY AT THE TIME WHILE HE WAS DOING THAT?

A. YES.

Q. SO SOME OF THE TIME WHILE THE MAN WITH THE SUNGLASSES WAS STANDING BESIDE THE DRIVER'S DOOR, YOU WERE LOOKING AT THE MAN WHO WAS PAWING THROUGH STUFF ON THE PASSENGER SIDE?

A. I'M SURE I GLANCED OVER THERE A COUPLE OF TIMES, YES.

MS. REMAL: THANK YOU. I DON'T HAVE ANY FURTHER QUESTIONS.

THE COURT: REDIRECT?

MR. PARKER: NO REDIRECT.

THE COURT: SIR, YOU MAY STAND DOWN. THANKS FOR YOUR ASSISTANCE. WOULD EITHER SIDE LIKE TO MAKE AN ARGUMENT OR STATEMENT?

MR. PARKER: JUST BRIEFLY, YOUR HONOR. AND I WILL REFER TO THE FACTORS THAT I HAVE LAID OUT IN PAGE NUMBER TWO OF MY MEMORANDA, AND THAT INCLUDES

FIVE FACTORS THAT THE COURT SHOULD CONSIDER IN CONSIDERING ALL THE CIRCUMSTANCES AND FACTS RELATED TO IDENTIFICATION.

THOSE ARE, ONE, THE OPPORTUNITY OF THE WITNESS TO VIEW THE ACTOR. TWO, THE WITNESS'S DEGREE OF ATTENTION. THREE, THE WITNESS'S CAPACITY. FOUR, THE WITNESS'S IDENTIFICATIONS WERE SPONTANEOUSLY MADE OR REMAINED CONSISTENT. AND, FIVE, THE NATURE OF THE EVENT BEING OBSERVED.

HERE, YOUR HONOR, WE HAVE A FAIRLY LONG PERIOD OF TIME WITH DURING WHICH THIS WHOLE THING OCCURRED. THE WITNESS TESTIFIED TO SOME PERIOD OF TIME WHEN HE FIRST STARTED SEEING THE DEFENDANT AND THIS OTHER PERSON, AND AS THEY APPROACHED FROM THE BACK HE WAS ABLE TO SEE THEM BEFORE REALLY BEFORE THE TRAUMA OF THE EVENTS STARTS. SO HE WAS ABLE TO SEE THEM AS THEY PASSED THE CAR. AND WHEN THEY TURNED BACK AND CAME BACK, HE SAW THEIR FACES.

THEN HE SAW THEM INITIALLY AT THE DOOR AND ACTUALLY SPOKE WITH THE PERSON WITH THE DARK GLASSES, WHO HE HAS IDENTIFIED AS THE DEFENDANT, PRIOR TO THE PRODUCTION OF THE GUN. ALL DURING WHICH THERE WAS NO TRAUMA OF THIS EVENT AND NONE OF THE FRIGHTENING CIRCUMSTANCES THAT OCCURRED LATER.

THESE INDIVIDUALS WERE VERY CLOSE. THE

WITNESS HAD SLEPT THE NIGHT BEFORE, HE HADN'T TAKEN DRUGS, AT LEAST ANY IMPROPER SUBSTANCES. NO ALCOHOL. THE PRESCRIPTION DRUGS THAT HE TOOK HELPED TO CLEAR HIS MIND AND HELPED HIM IN DOING WHAT HE NEEDED TO DO. THEY DID NOT INTERFERE WITH HIS CAPACITY.

BUT BEYOND THAT, AFTER THE EVENT OCCURRED, WHEN HIS ATTENTION WAS FOCUSED VERY MUCH ON THE EVENT AND ON THE ACTORS, AND THERE'S NO ROOM FOR ARGUMENT HERE THAT SOMEHOW THE VICTIM DID NOT UNDERSTAND THE NATURE OF THIS EVENT, DID NOT UNDERSTAND HE WAS BEING ROBBED, OR THIS DEFENDANT AND THIS OTHER PERSON WERE ROBBING HIM.

HE STOOD RIGHT NEXT TO THE DEFENDANT. AND AS HE WAS ASKED TO GET OUT OF THE CAR, HE WAS THEN PLACED BACK INTO THE BACKSEAT OF THE CAR WITH THE DEFENDANT AND SPENT AN HOUR OR SO RIDING AROUND, TALKING WITH THE TWO PEOPLE IN THE CAR, AND INCLUDING THE DEFENDANT.

THE ONLY MASK OF THE DEFENDANT'S FACE WAS THESE DARK GLASSES, OF WHICH HE COULD SEE INTO HIS EYES FROM THE SIDE VIEW. HE WAS THEN TAKEN UP THE CANYON AND, AGAIN, SPENT A CONSIDERABLE AMOUNT OF TIME WITH THE DEFENDANT, AS THE OTHER PERSON TOOK THE CAR AND LEFT.

THIS IS PLENTY OF OPPORTUNITY FOR THE WITNESS TO VIEW THE ACTOR. HIS DEGREE OF ATTENTION, I THINK, IS FOUND FROM THE EVENTS AND CIRCUMSTANCES THAT HE IS ABLE TO DESCRIBE THINGS IN DETAIL. HE'S A CREDIBLE WITNESS.

HIS CAPACITY ALSO IS INDICATED BY THE NATURE OF THAT. HE SPEAKS ABOUT THE CIRCUMSTANCES AND HE CAN TALK ABOUT THAT IN A LOGICAL MANNER, THE ORDER IN WHICH THINGS PROCEEDED.

HE HAS IDENTIFIED THE DEFENDANT TWICE BEFORE, IN BOTH A PHOTO SHOW-UP AND IN A PHYSICAL LINEUP. HE HAS NEVER BEEN WRONG IN HIS IDENTIFICATION. HE INDICATES THAT HE HAS NOT SEEN, NOR AT LEAST PRIOR TO THE PHOTO LINEUP ANY PHOTOGRAPHS OR ANY OTHER PICTURES THAT WOULD POINT HIM AT THE DEFENDANT. I DO NOT -- I DO NOT THINK THERE'S ANY INDICATION IN EITHER LINEUP OF ANY IMPROPER SUGGESTION IN THE MANNER THEY WERE CONDUCTED OR THE MANNER OF THE PERSONS OR PHOTOGRAPHS WERE SHOWN TO HIM.

AND, AGAIN, JUST BY THE VERY NATURE OF THIS EVENT, THE NATURE OF -- AS HE TALKS, HOW HE TRIED TO KEEP THINGS CALM, AND HE TRIED TO DO SOME THINGS TO MAKE SURE HE SURVIVED, INDICATED THAT HE APPROACHED THIS VERY LOGICALLY, AND TRIED TO DO THE BEST HE

CAN, BUT WAS IN A SET OF CIRCUMSTANCES THAT CAN ONLY CORROBORATE AND INDICATE THE RELIABILITY OF HIS IDENTIFICATION.

THE SHEER LENGTH OF TIME AND THE PROXIMITY THAT HE HAD DURING THIS LONG TIME WITH THE DEFENDANT AND THIS OTHER INDIVIDUAL INDICATES THAT HIS IDENTIFICATIONS, BOTH OUT OF COURT AND IN COURT, ARE RELIABLE.

MS. REMAL: BRIEFLY YOUR HONOR. IN TERMS OF THE OPPORTUNITY OF THE WITNESS TO VIEW THE ACTOR, AS MR. PARKER ALSO INDICATED, THE SUNGLASSES OF COURSE WOULD IMPEDE THAT TO SOME EXTENT. HIS ABILITY TO SEE THE INDIVIDUAL WAS OF COURSE ALSO AFFECTED BY THE STABILITY, BY THE FACT THAT HE'S SOMETIMES LOOKING AT THE GUN, SOMETIMES HE IS LOOKING AT THE OTHER PARTICIPANT, AND SOMETIMES HE'S LOOKING AHEAD.

AND MOSTLY HE'S LOOKING AT THE SIDE OF THAT INDIVIDUAL'S FACE. ALTHOUGH CERTAINLY I REALIZE THAT AS THE VICTIM OF THIS CRIME HE UNDERSTANDS THAT IS AN UNUSUAL EVENT, PRIOR TO THAT, WHEN THE INDIVIDUALS APPROACHED THE CAR AND ASKED ABOUT THE LOCATION OF SOME OTHER BUSINESS, HE'S NOT REALLY NECESSARILY UNDERSTANDING THAT THIS IS GOING TO LEAD TO SOMETHING ELSE. SO MAY NOT HAVE BEEN PAYING AS

MUCH ATTENTION AS THAT POINT, CLEARLY, AS HE MIGHT OTHERWISE HAD DONE.

CERTAINLY AN INDIVIDUAL IN MR. LEWIS'S SITUATION WOULD BE, LIKE HIM, VERY TRAUMATIZED. AND IN FACT HE INDICATED TO THE OFFICERS WHEN HE MET WITH THEM RIGHT AFTER THE EVENT HAD ENDED, THAT HE WAS SO TRAUMATIZED HE WASN'T SURE THAT HE COULD IDENTIFY THESE INDIVIDUALS. AND THAT'S CERTAINLY UNDERSTANDABLE.

IN TERMS OF ANY SUGGESTIVE FACTORS, I'D SUBMIT TO THE COURT THERE ARE SOME SIGNIFICANT SUGGESTIVE FACTORS THAT I THINK THE COURT OUGHT TO CONSIDER. AND THAT IS, THAT AFTER THE PHOTO-SPREAD MR. LEWIS WAS TOLD BY THE DETECTIVE THAT HE GOT THE RIGHT GUY.

I WOULD SUBMIT TO THE COURT THAT THAT'S SORT OF A PAT ON THE BACK BY AN AUTHORITY FIGURE THAT DID YOU THE RIGHT THING. SO TO THE EXTENT THAT MR. LEWIS INDICATED HE WASN'T ABSOLUTELY SURE IN HIS IDENTIFICATION OF THE PHOTO-SPREAD, SOMEBODY -- SORT OF AN AUTHORITY FIGURE HAS INDICATED, "YOU CAN BE SURE THIS IS THE RIGHT GUY."

AND, AGAIN, AFTER THE LINEUP, MR. PARKER INDICATED TO HIM THAT HE PICKED THE RIGHT GUY, OR "YOU GOT HIM," HOWEVER IT WAS THAT HE INDICATED

THAT.

I'D SUBMIT TO THE COURT THAT THAT IN FACT IS SOME SUGGESTION THAT IS IMPROPER, AND THAT THAT CERTAINLY AFFECTS THE WITNESS'S ABILITY TO HAVE AND INDEPENDENT RECOLLECTION OF THE EVENT, THE IDENTIFICATION. AND I SUBMIT THAT UNDER THOSE CIRCUMSTANCES THE COURT OUGHT TO DISALLOW THE STATE FROM HAVING MR. LEWIS TESTIFY TO ANYTHING OTHER THAN HIS INITIAL IDENTIFICATION IN THE PHOTO-SPREAD.

BECAUSE I WOULD SUBMIT THAT THE LINEUP AND THE IN-COURT IDENTIFICATION, ALL OF WHICH TOOK PLACE AFTER DETECTIVE TIMMERMAN'S STATEMENT THAT, "YOU PICKED THE RIGHT SUSPECTS IN THE OF PHOTO-SPREAD," WOULD HAVE TAINTED THOSE LATER IDENTIFICATIONS.

THE COURT: ALL RIGHT. IT IS CLEAR FROM THE CASE LAW, AND I AM REFERRING NOT ONLY TO RAMIREZ, BUT ALSO TO STATE VERSUS NELSON, THE EARLIER CASE OF STATE VS LONG, AS TO THE COURT'S CONSIDERATION OF THE RELIABILITY OF EYE-WITNESS IDENTIFICATION, THERE ARE A NUMBER OF FACTORS FOR THE COURT TO CONSIDER BEFORE EYE-WITNESS IDENTIFICATION DATA IS PRESENTED TO THE FINDER OF FACT.

WE HAVE AN UNUNUSUALLY CLEAR, ARTICULATE WITNESS IN THIS CASE. THAT IS NOT ALWAYS WHAT

PROSECUTION HAS TO DEAL WITH, OR WHAT THE DEFENSE HAS TO CONTEND WITH.

THE INDIVIDUAL IN THIS CASE IS A MAN WHO APPEARS TO BE, AND I DON'T KNOW IF I AM CORRECT ON HIS AGE, BUT IN HIS LATER '30S, OR '40S. HE'S NOT TOO YOUNG, HE'S NOT TOO OLD, TO HAVE GOOD JUDGMENT AND A SENSE OF PERSPECTIVE. HE HAS ATTESTED TO THE FACT THAT HE HAD MORE THAN ADEQUATE OPPORTUNITY TO SEE, TO REMEMBER, TO FORM AN OPINION, TO LOOK AT THE PERSON HE IDENTIFIED AS THE DEFENDANT, FROM A NUMBER OF DIFFERENT ANGLES, OVER A LENGTHY PERIOD.

THAT THERE WAS NOTHING OBSCURING HIS FACE IN GENERAL, THAT HIS EYES WERE COVERED BY SUNGLASSES, BUT THAT HE WAS ABLE TO SEE BEHIND THE EYES. IN FACT, ONE OF THE THINGS HE NOTICED WAS THE PATTERN, IF YOU WILL, OF BLINKING. HIS IDENTIFICATION IS CONSISTENT WITH HIS DESCRIPTION. THE IDENTIFICATION IS CONSISTENT IN EVERY RESPECT. THERE WAS AN IDENTIFICATION IN A PHOTO-SPREAD, AND ALSO A LINEUP, AND THEY WERE CONSISTENT. THERE'S NEVER BEEN A FAILURE IDENTIFY.

THERE IS A THEORY THAT ONE OF THE FACTORS THAT MAY IMPACT ONE'S ABILITY TO MAKE A GOOD IDENTIFICATION IS FEAR. AND CERTAINLY THAT MAY BE THE CASE. IT'S ALSO THE COURT'S BELIEF THAT FEAR

MAY BE A FACTOR THAT ENHANCES ONE'S OPPORTUNITY TO LOOK CLOSELY, TO OBSERVE, AND TO REMEMBER, BECAUSE YOU KNOW IT'S IMPORTANT TO DO SO.

IN THIS CASE I FIND THAT, AS MS. REMAL-- OR I BELIEVE MR. PARKER POINTED OUT, SOME OF THE OBSERVATIONS PRECEDED WHAT ONE WOULD REFER TO AS TRAUMA. THEY OCCURRED THROUGH FIRST THE REAR VIEW MIRROR, AND AS THE PERSONS STEPPED NEARER THE CAR ITSELF, LONG BEFORE A WEAPON WAS DISPLAYED.

AND ONCE THE WEAPON WAS DISPLAYED, THE WITNESS HAD EVERY REASON TO BE CAUTIOUS AND CAREFULM WHICH HE WAS, SHOWING A CALM, LOGICAL, INTELLIGENT APPROACH. BUT HE ALSO HAD EVERY REASON TO REMEMBER THE FACES OF THE INDIVIDUALS. AND THAT'S CONSISTENT WITH HIS IDENTIFICATION.

HE NOT ONLY SAW THE PERSON FROM A DISTANCE, HE SAW THE PERSON CLOSE UP. HE NOT ONLY SAW THE PERSON FROM THE POSITION OF BEING IN THE CAR LOOKING OUTSIDE OF THE CAR, HE ALSO HAD THE OPPORTUNITY TO ASSESS HEIGHT AND STATURE BY STANDING NEXT TO THE INDIVIDUALS.

THERE ARE NO RACE ISSUES THAT CONFUSE OR MAKE MORE DIFFICULT THE ISSUE OF IDENTIFICATION. THERE ARE NO PROBLEMS WITH THE WITNESS'S CAPACITY TO MAKE OBSERVATIONS, NO PROBLEMS WITH HIS MENTAL STATE

ON THE DATE AT ISSUE. HE APPEARS TO BE A SUPREMELY INTELLIGENT MAN, WHO HAD AN ADEQUATE AMOUNT OF TIME TO SLEEP, WHO WAS NOT UNDER THE INFLUENCE OF DRUGS THAT WOULD HAVE INTERFERRED WITH HIS CAPACITY TO OBSERVE, TO REMEMBER.

HE ALSO TESTIFIED IN A MANNER CONSISTENT WITH SOMEONE WHO PAID CAREFUL ATTENTION AND WAS FOCUSED ON WHAT WAS OCURRING. THE COURT ALSO NOTES THAT WE ARE NOT LOOKING AT WHAT I WOULD CALL A SUGGESTIVE IDENTIFICATION PROCESS. THAT IS, AT THE SHOW-UP PROCESS. BUT RATHER THE MORE STANDARD AND PERMISSIBLE PROCESS OF FIRST COMMENCING WITH THE DESCRIPTION, FOLLOWED BY A PHOTO-SPREAD.

AND IN THIS CASE THE COURT NOTES THE PHOTO-SPREAD IS IS SIX SIMILARLY COLORED PHOTOGRAPHS, WHICH I THINK IS MORE LIKELY TO YIELD A FAIR DETERMINATION AS TO IDENTIFICATION.

THAT IS FOLLOWED BY A LINEUP INVOLVING EIGHT SIMILAR INDIVIDUALS, WITH SIMILAR COLORING, STATURE, SIMILAR RACE, ETC. THE WITNESS HAS FURTHER ATTESTED TO GOOD LIGHTING THROUGHOUT WHAT WAS A LONG ENCOUNTER.

WE'RE NOT TALKING ABOUT LESS THAN A MINUTE, ONE PERSON LOOKING AT ANOTHER OVER THE COUNTER IN A CONVENIENCE STORE. RATHER, WE'RE TALKING ABOUT A

SCENARIO THAT INCLUDES A VARIETY OF OPPORTUNITIES TO OBSERVE OVER A FAIRLY SIGNIFICANT PERIOD OF TIME.

THERE'S BEEN NOTHING IN THE WITNESS'S DEMEANOR TO SUGGEST THAT ANY FEAR HE MIGHT HAVE FELT HAS RESULTED IN CONFUSION. AS MR. PARKER HAS POINTED OUT, THE WITNESS'S SPEECH WAS CALM, PRECISE, LOGICAL, THOUGHTFUL, AND CLEAR, IN HIS DESCRIPTIONS OF WHAT HE HE OBSERVED AND IN HIS RECOLLECTION, AND SO FORTH, OF THE SAME.

THEREFORE, THE COURT FINDS THAT THE WITNESS HAD AN ADEQUATE OPPORTUNITY TO VIEW THE ACTOR DURING THE EVENT AND LEADING UP TO THE EVENT, THAT THE WITNESS PAID A HIGH DEGREE OF ATTENTION TO THE ACTOR AT THE TIME OF THE EVENT BECAUSE OF THE NATURE OF THE CIRCUMSTANCES, BECAUSE OF THE FACT THAT HE IS A RELATIVELY YOUNG MAN WITH GOOD JUDGMENT AND GREAT CAPACITY TO OBSERVE AND REMEMBER.

THAT HE DOES IN FACT TESTIFY TO HIS CAPACITY TO OBSERVE THE EVENTS, AND HIS STATEMENTS, AS WELL, REFLECTED THAT, THAT HE HAD NO PHYSICAL OR MENTAL LIMITATION. ON THE CONTRARY, HE HAD PHYSICAL AND MENTAL ACCUITY.

THAT THE IDENTIFICATION WAS MADE IN A RESPONSIBLE MANNER THAT IT BEGAN WITH HIS DESCRIPTION, UNAIDED BY SOMEONE ATTEMPTING TO DIRECT

THAT DESCRIPTION IN ANY PARTICULAR MANNER OR ATTEMPTING TO SUGGEST A CERTAIN DESCRIPTION WOULD BE APPROPRIATE OR CONSISTENT.

THE MERE FACT THAT OFFICER TIMMERMAN MAY HAVE SAID TO HIM, AFTER HIS IDENTIFICATION, AND AFTER HIS DESCRIPTION, THAT HE HAD PICKED A PERSON THAT THEY ALSO BELIEVED MIGHT BE THE INDIVIDUAL, TO THIS COURT'S MIND DID NOT IN ANY WAY TAINT THAT IDENTIFICATION.

IT WAS NOT PRIOR TO; IT WAS SUBSEQUENT TO THE IDENTIFICATION. IT IS CLEAR WHEN THE WITNESS WAS BROUGHT IN FOR THE IDENTIFICATION PROCEDURE IT WAS IS NOT SO FAR AFTER THE THE EVENT THAT HIS MEMORY WOULD HAVE BEEN IMPAIRED. RATHER, IT WAS CLOSE IN TIME, AS WAS THE LINEUP. AND THERE WAS NO IMPERMISSIBLE SUGGESTION PRIOR TO THE PHOTO-SPREAD OR THE LINEUP SUCH AS, "THE PERSON'S IN THE THE SPREAD; PICK THEM OUT," OR, "THE PERSON'S IN THE LINEUP; PICK THEM OUT."

RATHER, IT WAS A GENERAL STATEMENT, "WE'D LIKE YOU TO LOOK AT THIS AND SEE IF YOU CAN IDENTIFY THE PERSON OR PERSONS THAT WERE INVOLVED." THIS IS NOT IMPERMISSIBLE. AND, FURTHER, ALL OF THE TESTIMONY OF THE WITNESS, TAKEN IN IT'S TOTALITY, INDICATES TO THE COURT THAT THE EVENT WAS OBSERVED

CLEARLY AND CAREFULLY BY THE WITNESS, THAT THERE IS A STRONG LIKELIHOOD, CONSISTENT WITH HIS TESTIMONY, THAT HE WAS ABLE TO PERCEIVE, REMEMBER, AND RELATE WHAT WAS OBSERVED.

THE FACTORS THAT IMPACT OBSERVATION, INCLUDING LIGHTING, TIME OF OBSERVATION, LENGTH OF OBSERVATION, ANY BIASES, INTERFERRENCE, HAVE ALL BEEN CONSIDERED BY THIS COURT, AND THE COURT FINDS NO BIAS, NO INTERFERENCE WITH THE OPPORTUNITY TO SEE OR THE CAPACITY TO REMEMBER.

THERE ARE NO RACIAL COMPONENTS HERE. AND IN SHORT, THE COURT FINDS THAT WHILE THIS IS AN ISSUE OF FACT, NELSON AND RAMIRIZ MADE CLEAR THAT THE COURT MUST MAKE AN INITIAL INDICATION OF WHETHER THE EYE-WITNESS IDENTIFICATION IS RELIABLE. AND THIS COURT DETERMINES AT THIS TIME THAT IT IS A RELIABLE EYE-WITNESS IDENTIFICATION.

BASED UPON THE FACTORS I'VE INDICATED. THAT IS TO SAY, THE FINDERS OF FACT WHO LISTEN TO THIS EVIDENCE COULD CONCLUDE THAT THE WITNESS HAS IDENTIFIED THE DEFENDANT, AND THERE ARE MANY FACTORS THAT CAN BE CONSIDERED IN THE JURY MAKING SUCH AN ASSESSMENT. THERE IS NOT A PAUCITY OF EVIDENCE HERE OR THE LACK OF OPPORTUNITY FOR IDENTIFICATION.

TO THE CONTRARY. THE WITNESS, FURTHER, HAS

SUFFICIENT AGE TO HAVE LIFE EXPERIENCES THAT WOULD AID HIM IN MAKING AN IDENTIFICATION.

IN OTHER WORDS, HE'S NOT, IF YOU WILL EXCUSE ME FOR USING THE PHRASE THAT'S SO REPUGNANT I TO MY DAUGHTER, HE'S NOT A KID. HE'S NOT AN ELDERLY PERSON WITH SIGHT PROBLEMS, BUT RATHER A PERSON OF MODERATE TO YOUNG AGE WHO IS IN AN EXCELLENT POSITION TO MAKE AN IDENTIFICATION.

AND THE COURT FURTHER INCLUDES THAT THE IDENTIFICATION WAS INDEPENDENT OF ANY SUGGESTIVE PROCEDURES, ATTITUDES, OR STATEMENTS BY LAW ENFORCEMENT. I WILL FURTHER CONSIDER THESE SAME FACTORS AS THE TESTIMONY IS ADDUCED, BUT I HAVE MADE THESE FINDINGS AT THIS TIME BASED UPON THE TESTIMONY I HEARD TODAY AND MY CAREFUL CONSIDERATION OF THE SAME.

WE HAD A DESCRIPTION, FOR EXAMPLE, NOT ONLY RELATIVE TO HEIGHT AND LIGHTING, BUT AS TO THE COLORING OF THE DEFENDANT, HIS STATURE, HIS FACIAL HAIR, THE COLOR OF HIS HEAD HAIR, CERTAIN SPECIFIC CHARACTERISTICS ABOUT HIS EYES.

AND ALL OF THIS CAUSED THE COURT TO BELIEVE THAT THE WITNESS IS A PERSON WHO IS CREDIBLE, AND TO WHOM THE JURY COULD LOOK FOR RELIABLE TESTIMONY, AND MAY ATTEND TO THE SAME.

IS THERE ANYTHING FURTHER AT THIS TIME?

MR. PARKER: NOT FROM THE STATE

MS. REMAL: NO, YOUR HONOR.

THE COURT: MR. PARKER, I DON'T EXPECT YOU'RE GOING TO HAVE THE TIME TO REDUCE THIS TO WRITING BETWEEN NOW AND THE TRIAL ON MONDAY. BUT I AM GOING TO LAY ON THE BURDEN, IF YOU WILL, OF PREPARING FINDINGS AND AN ORDER ON THIS ISSUE OF EYE-WITNESS IDENTIFICATION CONSISTENT WITH BUT NOT LIMITED TO WHAT I HAVE ARTICULATED.

AND SINCE WE HAVE ONE OF THE WORD BEST COURT REPORTERS PRESENT, I'M SURE GAYLE AT SOME POINT CAN PULL A TRANSCRIPT FOR YOU TO ASSIST YOU IN THAT REGARD.

I THINK THAT PROBABLY TAKES CARE OF THE ISSUES OF EYE-WITNESS IDENTIFICATION. I HAVE FROM BOTH SIDES SUGGESTED VOIR DIRE FOR THE PROCESS ON MONDAY. WE'RE COMMENCING AT 9:00 O'CLOCK. I'LL ASK COUNSEL TO BE HERE AT 8:30. I ASK THE DEFENDANT TO BE TRANSPORTED AS CLOSE TO 8:00 O'CLOCK AS POSSIBLE SO MS. REMAL CAN SPEND AS MUCH TIME AS SHE WISHES TO MEET WITH HIM PRIOR TO THE TRIAL.

DO EITHER OF YOU, MR. PARKER OR MS. REMAL, HAVE ANY OBJECTIONS TO THE THE OTHER SIDE'S REQUESTED VOIR DIRE?

MR. PARKER: I DO NOT.

MS. REMAL: I DON'T.

THE COURT: WHAT I'M GOING TO DO IS WHAT I BELIEVE I SUGGESTED TO YOU BOTH BEFORE. I WILL ASK THE VOIR STOCK VOIR DIRE, WHICH INCLUDES SOME OF WHAT YOU HAVE ASKED FOR, OR BOTH SPECIFICALLY ASKED.

AND THOSE QUESTIONS YOU MAY ASK YOURSELF, OR YOU MAY FOLLOW-UP ON ANY QUESTIONS THE COURT ASKS OR REMIND THE COURT, EITHER BY ASKING THEMSELVES OR ASKING ME TO ASK ANY QUESTIONS THAT ARE LOGICAL BY WAY OF FOLLOW-UP THAT I MAY NOT HAVE ASKED.

IN OTHER WORDS, MY PURPOSE IS TO LET YOU BE INVOLVED IN THE VOIR DIRE PROCESS. I HAVE INSTRUCTIONS. YOU MAY CERTAINLY SUPPLEMENT THEM AS WE GO THROUGH. I DON'T THINK THERE IS ANYTHING FURTHER AT THIS TIME IN TERMS OF TIMING, SO WE'LL COMMENCE AS NINE IN TERMS OF PICKING A JURY. WE'LL MOVE AS QUICKLY AS WE CAN, MAKING SURE THAT WE TAKE THE TIME WE NEED TO. I EXPECT TO HAVE A JURY AND DO OPENINGS BEFORE THE NOON RECESS. WE'LL PROBABLY NOT HAVE AN OPPORTUNITY TO CALL WITNESS UNTIL THE AFTERNOON.

MY HABIT IS GENERALLY TAKE AN HOUR AND A HALF FOR LUNCH, AND GENERALLY BREAK AROUND FIVE OR FIVE-THIRTY, DEPENDING ON THE PROGRESS WE'RE MAKING.

I WON'T STOP AT NOON IF WE ARE THE MIDDLE OF SOMETHING. WE'LL GO A LITTLE LATER. BUT GENERALLY, WE TRY TO STOP AROUND NOON. BUT I TRY TO BE SENSITIVE TO COUNSEL'S SUGGESTION, AND ALSO TO THE WITNESS'S SCHEDULE. IF WE'RE CLOSE TO FINISHING WITH SOMEONE, I LIKE TO DO THAT BEFORE WE TAKE OUR NOON BREAK. WE WILL TAKE A SHORT BREAK IN THE MORNING AND A SHORT BREAK IN THE AFTERNOON, AS WELL.

ON TUESDAY, WE'LL LIKELY START AT 8:30 INSTEAD OF 9:00 O'CLOCK.

MR. PARKER, HOW MANY WITNESSES, TOTAL, WILL YOU BECALLING IN THE TRIAL?

MR. PARKER: WELL, MY ACTUAL WITNESS LIST INCLUDES ABOUT EIGHT, BUT THE ONES THAT I'M ASSUMING WE'LL GO FORWARD WITH, BARRING SOME CHANGE, IS JUST FIVE. TWO OF THOSE WILL BE RATHER LONG, THREE FAIRLY BRIEF.

THE COURT: MS. REMAL?

MS. REMAL: I ANTICIPATE TWO OR THREE.

THE COURT: OKAY. AND I KNOW THAT YOU MAY NOT HAVE MADE THIS DETERMINATION, OR MAY NOT BE PREPARED TO DIVULGE THE INFORMATION, WHICH YOU DON'T NEED TO, BUT HAVE YOU MADE A DETERMINATION AS TO WHETHER THE DEFENDANT WILL BE TESTIFYING?

MS. REMAL: I HAVE NOT. WE HAVE DISCUSSED

IN TOGETHER. AND, FRANKLY, YOUR HONOR, I HAVE INDICATED TO HIM THAT I THINK WE OUGHT TO MAKE THAT DECISION FINALLY ONCE THE STATE HAS COMPLETED THEIR CASE.

THE COURT: CERTAINLY THAT'S UP TO YOU. I JUST THOUGHT IF YOU HAD A PERCEPTION AT THIS POINT, IT MIGHT BE HELPFUL. WE SHALL OBVIOUSLY LET YOU RESERVE THE RIGHT TO MAKE THAT DETERMINATION WHEN YOU DEEM IT APPROPRIATE.

WHAT I AM ASKING IS THAT, MR. PARKER, YOU MAKE KNOWN ANY AND ALL WITNESSES YOU MIGHT CALL. THE SAME WITH MS. REMAL.

MICHELLE, HOW MANY JURORS DO WE HAVE COMING IN?

THE CLERK: WE HAVE ORDERED 27.

THE COURT: TWENTY-SEVEN. AND TO MY RECOLLECTION, THIS CASE RECEIVED A LITTLE BIT OF PUBLICITY, BUT NOT A LARGE AMOUNT.

MS. REMAL: I THINK THAT'S ACCURATE.

THE COURT: SO I THINK THAT'S A GOOD NUMBER OF JURORS. DOES ANYONE HAVE ANY CONCERN WITH THE NUMBER.

MR. PARKER: NOT I.

MS. REMAL: NO.

THE COURT: DO YOU WANT TO PICK AN

ALTERNATE?

MS. REMAL: I DON'T--

MR. PARKER: I DON'T THINK WE NEED IT. I THINK THIS WILL BE A DAY-AND-A-HALF TRIAL.

THE COURT: SO UNLESS WE RUN INTO A PANEL OF JURORS THAT ALL LOOK LIKE THEY MAY HAVE SIGNIFICANT PROBLEMS, WE WON'T PICK AN ALTERNATE. BUT I WILL RESERVE THE RIGHT TO KIND OF USE MY INSTINCTS ON THAT. AND I WILL LOOK FORWARD TO SEEING YOU BOTH ON MONDAY. IS THERE ANYTHING FURTHER?

MS. REMAL: NOPE.

MR. PARKER: NO.

THE COURT: OKAY. AND ANY CLOTHES ISSUE TO THE DEFENDANT?

MS. REMAL: THEY'RE ALREADY HEAR IN THE BUILDING.

THE COURT: GREAT. WE'LL LOOK FORWARD TO SEEING YOU, THEN, ON MONDAY. THANK YOU. WE'RE IN RECESS.

(PROCEEDINGS CONCLUDED AT 5:15 P.M.)

C E R T I F I C A T E

STATE OF UTAH :

COUNTY OF SALT LAKE :

I, GAYLE B. CAMPBELL, CERTIFIED SHORTHAND REPORTER AND REGISTERED PROFESSIONAL REPORTER IN THE STATE OF UTAH HEREBY CERTIFY:

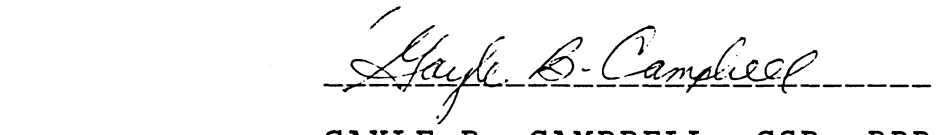
THAT I AM AN OFFICIAL COURT REPORTER IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH;

THAT I WAS PRESENT DURING THE ENTIRE PROCEEDINGS IN THE BEFORE-ENTITLED CAUSE;

THAT THE PROCEEDINGS WERE REPORTED STENOGRAPHICALLY BY ME, AND WERE THEREAFTER TRANSCRIBED.

THAT SAID TRANSCRIPT CONSTITUTES TO THE BEST OF MY ABILITY A TRUE AND COMPLETE RECORD OF THE PROCEEDINGS HAD.

IN WITNESS THEREOF, I HAVE SUBSCRIBED MY NAME AND SEAL THIS 5TH DAY OF JANUARY, 2000.



GAYLE B. CAMPBELL, CSR, RPR

Addendum C

DAVID E. YOCOM
District Attorney for Salt Lake County
PAUL B. PARKER, 4332
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- JACOB ROSS HALE, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 991906795 Hon. Leslie Lewis

This matter came before this court for a hearing on the reliability of an eyewitness identification on August 19, 1999. Paul B. Parker, Deputy Salt Lake District Attorney, represented the State. Defendant was present and represented by Lisa Remal, Salt Lake Legal Defender Association. Mitch Lewis, the eyewitness, testified about the events of March 19, 1999. Ms. Remal had the opportunity to cross-examine Mr. Lewis. Both sides then argued the matter.

Having heard the evidence and considered the arguments, this court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 19, 1999, Mitch Lewis, a white male in his later thirties, was seated alone in his car parked in Sugarhouse Park reading the newspaper. It was daytime and the area was well lighted. Mr. Lewis could see clearly with his glasses that he was wearing at the time.

2. Mr. Lewis looked into the rearview mirror and saw two white males walking toward him. He returned to reading.

3. Mr. Lewis looked up again as the two walked within a few feet of his car.

4. Mr. Lewis looked up again and saw the two males walking back toward his car. This time Mr. Lewis saw the faces of the two.

5. Mr. Lewis looked up the final time to see the two males standing within a few feet of the driver's door of his car.

6. One of the males, later identified as defendant, spoke to Mr. Lewis about the location of a local business.

7. Defendant had dark glasses on and had some facial hair but otherwise his face was uncovered. The other male, later identified as Justin Dongarra did not have his face covered either.

8. As Mr. Lewis first spoke with the two males, he was not upset or frightened. He was rested and was not under the influence of alcohol or drugs. He had taken some prescription drugs. One of these was for depression and actually helped clear his mind. He was not under the influence of these drugs nor did they interfere with his ability to observe and remember.

9. Defendant pulled a gun and pointed it at Mr. Lewis. Defendant then had Mr. Lewis get out of the car. As Mr. Lewis did, he stood within a few feet of defendant. He was able to see defendant as they stood and was able to compare heights and listen to his voice.

10. Defendant directed Mr. Lewis to sit in the back seat of the car. Defendant got into the back seat and sat inches away from Mr. Lewis.

11. Justin Dongarra drove the car. For more than one hour, the three drove around. During this time the two made direct and implied threats to Mr. Lewis.

12. Mr. Lewis saw the side of defendant's face and could see defendant's eyes through the side of the dark glasses. Mr. Lewis noted that defendant blinked in slow unusual

manner. Mr. Lewis also saw the front of defendant's face for brief periods of time during the trip.

13. Eventually, defendant and Mr. Dongarra drove Mr. Lewis up Big Cottonwood Canyon and stopped the car. They made Mr. Lewis get out and walk down the roadside toward the creek. Defendant followed. Mr. Dongarra drove away in the car.

14. Defendant held Mr. Lewis at gunpoint for another hour. During this time, defendant was only a few feet away from Mr. Lewis. The two talked. Mr. Lewis saw defendant's face from the front. It was still daylight and the lighting allowed Mr. Lewis to see defendant's face clearly.

15. Mr. Lewis was frightened during the event but he was deliberate and thoughtful in his approach. Furthermore, Mr. Lewis tried to observe and remember the defendant's face. He also tried to engage defendant in a conversation, and did so for a considerable time, in an attempt to keep defendant calm so Mr. Lewis would survive the encounter.

16. Eventually, Mr. Lewis was released and he contacted the police and reported the crime.

17. Approximately ten days later, police showed Mr. Lewis two series of six color photographs. One set that included defendant's photo and one set that included Mr. Dongarra's photo. The photographs contained different individuals with similar characteristics. Mr. Lewis was not told whether the defendant or Mr. Dongarra were in the photographic lineups. Mr. Lewis picked out both defendant and Mr. Dongarra. After Mr. Lewis picked out both suspects, the detective told Mr. Lewis that he had picked out the two persons arrested for the crime.

18. On May 4, 1999 a lineup was held in the Salt Lake County S.O. lineup room. Eight individuals with similar characteristics were in the lineup. Defendant was included in those eight. Again Mr. Lewis picked out defendant as the person who committed the crime

charged. Afterwards Mr. Lewis asked the prosecutor if he had picked the defendant. The prosecutor confirmed that Mr. Lewis had picked out the person charged with the crime.

19. Mr. Lewis has never identified persons other than defendant and Mr. Dongarra as the two persons who committed the crime.

20. Mr. Lewis' testimony about the events was detailed and clear. He is an unusually articulate and clear witness. He did not know the suspects or have any motive against them.

CONCLUSIONS OF LAW

1. Mr. Lewis had an adequate opportunity to view the persons who robbed and kidnapped him. The event took over two hours, a considerable amount of time to observe. The lighting was sufficient. The suspects stood or sat at close distances to Mr. Lewis. Other than the dark glasses the suspects' faces were not covered or obscured.

2. Mr. Lewis paid a high degree of attention to the event. He knew he was being robbed. He deliberately tried to see and remember the suspects who where committing the crimes of which he was the victim.

3. Mr. Lewis was not limited or impaired. Instead, he was very deliberate, calm and thoughtful. He is also clear and articulate. He was old enough to understand and comprehend the nature of the events. He had sufficient capacity to observe and remember the event.

4. Mr. Lewis' identification was spontaneous and not the product of suggestion. The photographic and physical lineups were conducted properly and not in a suggestive manner.

5. The nature of the event was one that Mr. Lewis was likely to remember and relate correctly. The race of the participants was the same. Mr. Lewis was free from bias. Mr. Lewis tried to remember the event. It lasted a long time. Mr. Lewis understood that he was being robbed and kidnapped.

6. The detectives statement confirming that Mr. Lewis had picked out the suspects held by the police did not occur until after the photographic lineup was completed. The prosecutors statements that Mr. Lewis had picked out the person charged did not occur until after the lineup was completed. These statements did not make either the photographic lineup or the physical lineup improperly suggestive.

7. Mr. Lewis' out of court and in court identifications are sufficiently reliable that the identifications should be presented to the jury during the trial.

ORDER

Having made the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that the testimony of Mitch Lewis is sufficiently reliable for presentation before the trier of fact at the upcoming trial.

DATED this ~~23rd~~ 27th day of ~~September~~ 8 Oct., 1999.

BY THE COURT:

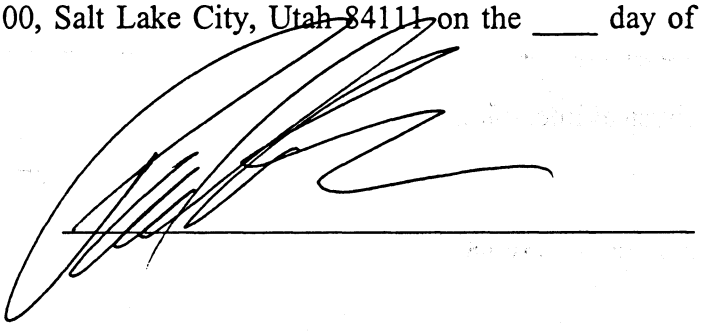
LESLIE LEWIS, District Judge

Approved as to form:

Lisa Remal

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Findings Of Fact, Conclusions Of Law And Order was delivered to Lisa Remal, Attorney for Defendant Jacob Ross Hale, at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the ____ day of September, 1999.



STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

JAN GRAHAM
ATTORNEY GENERAL

JAMES R SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

17 October 2000

Paulette Stagg
Clerk of the Court
Utah Court of Appeals
450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Re: ***State of Utah v. Hale***, Case No. 990939-CA

Dear Ms. Stagg:

Since the filing of the Brief of Appellee in this matter, pertinent authority has come to my attention concerning the eyewitness identification issue in this case. The State cites ***State v. Rivera***, 954 P.2d 225, 227 (Utah App. 1998), which pertains to the State's assertion at oral argument that a victim/eyewitness's "ordinary fear" is not alone sufficient to defeat the victim's capacity to observe the event, including his or her physical and mental acuity. *See also* Aple. Br. at pp. 27.

This supplemental authority is submitted pursuant to rule 24(i), Utah Rules of Appellate Procedure.

Sincerely,

MARIAN DECKER
Assistant Attorney General

cc: Catherine E. Lilly

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Danny RIVERA, Defendant and Appellant.

No. 930154-CA.

Feb. 12, 1998.

After his motion to quash bindover of two charges from magistrate was denied, defendant entered conditional plea of no contest to one charge in return for dismissal of other charge in the Third District Court, Salt Lake County, Anne M. Stirba, J., and then he appealed. The Court of Appeals vacated plea, 871 P.2d 1023, but the Supreme Court reversed, 906 P.2d 311. On remand, the Court of Appeals, Howe, J., affirmed conviction, 906 P.2d 318, and certiorari was granted. The Supreme Court, Durham, J., reversed and remanded. The Court of Appeals, Howe, A.C.J., held that: (1) showup identification of defendant was admissible, and (2) evidence supported bindover decision.

Affirmed.

West Headnotes

[1] Criminal Law 238(1)
110k238(1)

In making determination as to probable cause, magistrate should view evidence in light most favorable to prosecution and resolve all inferences in favor of prosecution.

[2] Criminal Law 238(1)
110k238(1)

[2] Criminal Law 339.8(1)
110k339.8(1)

Evidence at preliminary hearing, including witness's description of robber's clothing, supported magistrate's decision to bind over defendant on aggravated robbery charge.

[3] Criminal Law 234
110k234

Witness' showup identification of defendant was admissible to show probable cause, where record indicated robber was only person in store during robbery, witness' attention was focused on robber's clothing, she observed that robber was young Hispanic male wearing black shirt, black sweat pants, dark hat, black tennis shoes, and no socks, and robber did not wear mask or otherwise attempt to conceal his face; witness had ample opportunity to view robber and she paid particular attention to him during course of robbery.

[4] Criminal Law 339.8(6)
110k339.8(6)

Victim's ordinary fear was not sufficient to defeat reliability of showup identification; even though victim was nervous and crying at time of robbery, she was still able to carefully observe robber's clothing and appearance, and she was able to observe robber while she was outside minutes before robbery occurred and before she had reason to be fearful.

[5] Criminal Law 339.8(1)
110k339.8(1)
Confrontation.

Inconsistencies between witness' showup identification and lineup identification did not make witness so unreliable that identification could not be used to establish probable cause, where showup identification was made within one hour of robbery and lineup identification occurred several months later, witness testified that in spite of her identification of another individual at lineup, she was not positive that person identified at lineup was the robber, and witness' description of robber remained the same.

[6] Criminal Law 339.8(5)
110k339.8(5)

Any conflicts in witness' description of robber's height, brand of his shoes, or details of his hat were not significant enough to make her showup identification entirely unreliable.

[7] Criminal Law 234
110k234

Circumstances underlying defendant's showup identification were not so suggestive that it could not be used to establish probable cause, even though defendant was chosen by witness while he was handcuffed and being held by several police officers.

[8] Criminal Law 339.8(1)
110k339.8(1)

[8] Robbery 24.40
342k24.40

Because defendant's showup identification sufficiently met all of the Ramirez reliability factors, it was properly used to establish probable cause against defendant and bind him over for trial on aggravated robbery charges.

[9] Criminal Law 323
110k323

Although flight is not absolute proof of guilt, it may support reasonable inference of guilt.

[10] Criminal Law 238(2)
110k238(2)

Prosecution was not required to prove defendant's guilt beyond a reasonable doubt at preliminary hearing, rather, it merely needed to present quantum of evidence sufficient to warrant submission of case to trier of fact.

***226** Joan C. Watt and Elizabeth A. Bowman, Salt Lake City, for Defendant and Appellant.

Jan Graham and Kenneth A. Bronston, Salt Lake City, for Plaintiff and Appellee.

Before HOWE, Associate C.J., [FN1] and BENCH and BILLINGS JJ.

FN1. The Honorable Richard C. Howe, Utah Supreme Court Associate Chief Justice, sitting by special appointment pursuant to Utah Code Ann. § 78-7-9.5 (1995); Utah Code Jud. Admin. RC-108(3).

OPINION

HOWE, Associate Chief Justice:

This case is again before us on remand from the supreme court.

BACKGROUND

In August 1992, the State charged defendant Danny Rivera by an information with count I, aggravated robbery; count II, possession of a dangerous weapon by a restricted person; and count III, failure to respond to an officer's signal to stop. At a preliminary hearing on these charges, Rivera moved to dismiss counts I and II. The magistrate denied his motion and bound him over to stand trial on all three counts. In the district court, he moved to quash the bindover, but the motion was denied. Thereafter, he entered a conditional no contest plea to count II of the information, possession of a dangerous weapon by a restricted person, a second degree felony, and counts I and III were dismissed as part of a plea agreement with the prosecutor. As part of his no contest plea, he explicitly reserved his right to appeal the adverse ruling on his motion to quash the bindover on counts I and II.

On appeal, this court held that the trial court erred in accepting Rivera's conditional no contest plea. We vacated the plea and remanded the case for trial. State v. Rivera, 871 P.2d 1023 (Utah Ct.App.1994). However, the supreme court granted certiorari, State v. Rivera, 892 P.2d 13 (Utah 1995), reversed this court, and remanded the case to us for further consideration. On remand, we affirmed the trial court's refusal to quash the bindover on count II but refused to review the trial court's failure to quash the bindover on count I because that charge had been dismissed and Rivera had not entered a plea to that count. State v. Rivera, 906 P.2d 318 (Utah Ct.App.1995). The supreme court again granted certiorari, State v. Rivera, 917 P.2d 556 (Utah 1996), reversed this court, and remanded this case to us for consideration of the trial court's denial of Rivera's motion to quash the bindover on count I, aggravated robbery. State v. Rivera, 943 P.2d 1344 (Utah 1997). We now consider whether the trial court erred in denying Rivera's motion to quash the bindover on count I.

FACTS

The charges against Rivera arise out of the June 1992 robbery of a Top Stop convenience store in Salt Lake County. The robber showed Brenda Kilgrow, the convenience store cashier, a gun and demanded money from the cash register. The robber then fled on foot, heading north on West Temple Street. Kilgrow called the police and described the robber as a young Hispanic male, wearing a black T-shirt, black sweat pants, black Reebok shoes, no socks, and a dark baseball hat.

Shortly after the robbery, Officer Dusten Hansen spotted a truck that was heading north on West Temple Street, about five blocks from the

convenience store. He noticed that the driver of the truck fit the general description of the robber that was given by the police dispatcher. He pulled ***227** behind the truck and turned on his overhead lights, signaling the driver to pull over. However, the driver did not pull over and began to accelerate to speeds of 60 to 70 miles an hour. The truck eventually crashed into a bus stop bench, and the driver fled on foot. Officer Hansen parked his own vehicle and chased after the driver on foot. The driver then returned to the scene of the wreck, unsuccessfully attempted to start Officer Hansen's vehicle, and then tried to jump into a slow moving car that was passing by. The driver was ultimately apprehended and identified as defendant Danny Rivera.

The police searched Rivera's truck and found a Ruger P85 9mm handgun and a dark blue New York Yankees baseball cap inside the cab. Rivera was a young- looking, Hispanic male and wore clothing matching Kilgrow's description of the robber. Officer Chris Snyder brought Kilgrow back to where Rivera was being detained. The morning was bright and Kilgrow did not have trouble seeing him. He was handcuffed and was forced to face her. She positively identified him as the robber.

Several months after the robbery, Kilgrow attended a police lineup. Rivera was not included in the lineup, [FN2] and Kilgrow identified another individual as the robber. However, at the preliminary hearing, Kilgrow testified that she had not been certain about her selection at the lineup.

> FN2. Because the individuals selected for the lineup did not closely resemble Rivera, the prosecution and defense stipulated to a lineup that did not include Rivera. Kilgrow was apparently instructed that Rivera may or may not be in the lineup. She was told that if she did not recognize anyone, she was to write that down. Nevertheless, she identified another individual who was in the lineup as the robber.

ANALYSIS

[1] The ultimate decision "to bind a defendant over for trial presents a question of law, which we review de novo without deference." State v. Jaeger, 896 P.2d 42, 44 (Utah Ct.App.1995) (citing State v. Humphrey, 823 P.2d 464, 466 (Utah 1991)). The parties agree that "[t]he probable cause showing at the preliminary examination must establish a prima facie case against the defendant from which the trier of fact could conclude the defendant was guilty of the offense as charged." State v. Anderson, 612 P.2d 778, 783 (Utah 1980). While this case has been pending on appeal, the Utah Supreme Court has explained this standard further. In State v. Pledger, 896 P.2d 1226 (Utah 1995), the court stated that "[i]n making a determination as to probable cause, the magistrate should view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution." Id. at 1229 (citations omitted). The court also explained that " '[u]nless the evidence is wholly lacking and incapable of reasonable inferences to prove some issue which supports the [prosecution's] claim,' the magistrate should bind the defendant over for trial." Id. (quoting Cruz v. Montoya, 660 P.2d 723, 729 (Utah 1983)). With these principles in mind, we turn to the evidence introduced by the prosecution at the preliminary hearing to determine if it was sufficient to establish probable cause and bind Rivera over for trial on the aggravated robbery charge.

[2] At the preliminary hearing, the prosecution introduced evidence that Rivera matched Kilgrow's description of the robber. It is undisputed that Rivera is a young-looking Hispanic male. Furthermore, at the time of his arrest, he was wearing a black shirt, black sweat pants, black tennis shoes, and no socks. Nevertheless, Rivera contends that Kilgrow's description of the robber does not accurately match him. He argues that although he was wearing black tennis shoes, they were not Reeboks, as described by Kilgrow. He also points out that Kilgrow's description of the baseball hat allegedly worn by the robber did not include the obvious white New York Yankees insignia or white stripes found on the hat in his truck. Although Rivera's points are accurate, they merely point out conflicts and inconsistencies in the evidence. As we explained above, the magistrate was required to resolve such conflicts and inconsistencies in favor of the prosecution. See Pledger, 896 P.2d at 1229; see also Jaeger, 896 P.2d at 45-46 (holding that the "magistrate should not have decided issues [against the prosecution] ***228** where the evidence was in conflict"). On this basis, we conclude that the magistrate correctly decided that Kilgrow's description of the robber's clothing closely matched that worn by Rivera at the time of his arrest and supported the State's contention that he was the robber.

The prosecution also introduced Kilgrow's showup identification of Rivera as evidence at the preliminary hearing. Rivera contends that this identification was so inherently unreliable that it could not support a showing of probable cause. We disagree. The parties agree that the decision in State v. Ramirez, 817 P.2d 774 (Utah 1991), is helpful to our analysis of the reliability question at issue in this case even though Ramirez dealt with the admissibility of a showup identification at trial. In Ramirez, the Utah Supreme Court set forth the following factors that must be used to determine the reliability of an eyewitness identification:

> "(1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly."

Id. at 781 (quoting State v. Long, 721 P.2d 483, 493 (Utah 1986)). Even though the court found that the facts in Ramirez presented "an extremely close case," the court held that the witness's showup identification of Ramirez was admissible as evidence at his trial. Id. at 784.

[3] In assailing the showup identification of him, Rivera first contends that Kilgrow's identification fails to meet the first and second reliability factors of Ramirez because she did not pay particular attention to the robber during the robbery. However, the record shows otherwise. The robber was the only other person in the store during the robbery. Rivera acknowledges that Kilgrow's attention was focused on his clothing. She observed that he was a young Hispanic male who was wearing a black shirt, black sweat pants, a dark hat, black tennis shoes, and no socks. He did not wear a mask or otherwise attempt to conceal his face. She also saw him flee north on foot. In light of Kilgrow's detailed observations of the robber, there is evidence that she had ample opportunity to view him and that she did pay particular attention to him during the course of the robbery.

[4] Rivera next contends that Kilgrow's identification of him also fails to meet the third reliability factor of Ramirez because she was nervous and afraid during the robbery. However, we do not think that the victim's ordinary fear is sufficient to defeat this factor. Otherwise, no victim of a violent crime could ever meet this factor. Even though Kilgrow was nervous and crying at the time of the robbery, she was still able to carefully observe the robber's clothing and appearance. Furthermore, she was able to observe the robber while she was outside smoking a cigarette, minutes before the robbery occurred and before she had reason to be fearful. For these reasons, we conclude that Kilgrow's identification adequately meets this factor.

[5] The fourth reliability factor is the most difficult to meet in this case. Rivera correctly points out that Kilgrow's identification of him has not remained entirely consistent because she identified the wrong man during the lineup. He also contends that the conflicts in her description of the robber demonstrate further inconsistencies in her identification. Nevertheless, we do not believe that these inconsistencies necessarily make her showup identification so unreliable that it cannot be used to establish probable cause.

While her showup identification was made within an hour of the robbery, the lineup identification did not take place until several months later. Furthermore, during the preliminary hearing, Kilgrow testified that in spite of her identification of another individual at the lineup, she was not positive that the person she had identified at the lineup was the robber. She explained that she was nervous ***229** during the lineup, paid little attention to the prosecutor's instructions, and did not really read the instruction card. She also testified that she picked the person in the lineup who most closely resembled Rivera. The magistrate was required to view this testimony in favor of the prosecution. Therefore, the magistrate correctly viewed Kilgrow's testimony as a reasonable explanation for her misidentification of the robber at the lineup.

[6] In addition, contrary to Rivera's assertion, Kilgrow's description of the robber has remained the same. At the time of the robbery, she described the robber as a young Hispanic male wearing a black shirt, black sweats, a dark hat, black Reebok tennis shoes, and no socks. She has not recanted this description. Furthermore, any conflicts in her description of his height, the brand of his shoes, or the details of his hat were not significant enough to make her identification entirely unreliable. The magistrate determined that she was "no rocket

scientist" and properly left the resolution of such conflicts for the jury at trial.

[7] We also do not believe that the circumstances underlying Kilgrow's showup identification were so suggestive that it could not be used to establish probable cause. Although it is true that Kilgrow identified Rivera while he was handcuffed and being held by several police officers, we find that these circumstances are remarkably similar to those in Ramirez. In that case, the witness identified Ramirez while he was handcuffed to a chain-linked fence and was surrounded by police officers. Ramirez, 817 P.2d at 784. Additionally, police officers in Ramirez remarked that they had apprehended someone who fit the description of one of the robbers. Id. Notwithstanding these circumstances, the court concluded that the showup identification was still admissible as evidence at trial. Id. Likewise, we conclude that the circumstances underlying Kilgrow's showup identification of Rivera were not so suggestive to make it wholly unreliable.

Finally, Rivera does not seriously contend that Kilgrow's identification fails to meet the fifth factor of Ramirez. Kilgrow was robbed when the convenience store was not yet open for regular business. The robber was the only other person inside the store at the time. The nature of this event made it likely that she would perceive and remember the event correctly.

[8] Because Kilgrow's showup identification sufficiently meets all of the Ramirez reliability factors, we conclude that it was properly used to establish probable cause against Rivera and bind him over for trial on the aggravated robbery charges. Furthermore, the magistrate correctly viewed this evidence in favor of the prosecution.

[9] In addition to Kilgrow's description of the robber and her showup identification of Rivera, the prosecution also introduced other evidence that supported the showing of probable cause. It presented the Ruger P85 9mm handgun that was found in Rivera's truck at the time of his arrest. The gun was especially significant, given Kilgrow's statements and testimony that the robber had shown her a handgun that was stuck in the waistband of his pants during the robbery. The prosecution also submitted evidence of Rivera's close proximity to the convenience store shortly after the robbery. Furthermore, it introduced evidence of his flight after Officer Hansen had signaled him to pull over. Although flight is not absolute proof of guilt, it may support a reasonable inference of guilt. See State v. James, 819 P.2d 781, 789 (Utah 1991) (stating evidence of flight may establish an inference of guilt). In sum, this additional evidence further supported the inference that Rivera committed the robbery at issue in this case.

[10] In conclusion, the prosecution's evidence was sufficient to show probable cause and bind Rivera over for trial on the aggravated robbery charge. The prosecution was not required to prove Rivera's guilt beyond a reasonable doubt at the preliminary hearing. See Anderson, 612 P.2d at 783. Rather, it merely needed to "present a quantum of evidence sufficient to warrant submission of the case to the trier of fact." Id. In light of the foregoing, it is evident that the prosecution did this at the preliminary hearing. Accordingly, we affirm the trial court's denial of ***230** Rivera's motion to quash the bindover on count I, aggravated robbery.

BENCH and BILLINGS, JJ., concur.

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